(28,933)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 393.

HARVEY McCONAUGHEY, FOR HIMSELF AND OTHERS, EMPLOYEES OF THE PANAMA CANAL AND OF THE PANAMA RAILROAD COMPANY, APPELLANT,

vs.

J. J. MORROW, GOVERNOR OF THE PANAMA CANAL; H. A. A. SMITH, AUDITOR OF THE PANAMA CANAL, AND R. W. GLAW, PAYMASTER OF THE PANAMA CANAL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1922.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit begun on the third Monday in November, A. D. 1921, at New Orleans, Louisiana, before the Honorable Richard W. Walker, the Honorable Nathan P. Bryan, and the Honorable Alex. C. King, circuit judges.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal et als., Appellees and Defendants in Error.

Be it remembered, That heretofore, to-wit, on the 21st day of January, A. D. 1922, a transcript of the record in the above styled cause, pursuant to an appeal from and *and* writ of error to the United States District Court for the Canal Zone, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3826, as follows, to-wit:

UNITED STATES OF AMERICA.

UNITED STATES DISTRICT COURT, IN AND FOR THE CANAL ZONE.

HARVEY McCONAUGHEY, FOR HIMSELF AND IN BEHALF OF ALL OTHER EMPLOYEES OF THE PANAMA CANAL AND THE PANAMA RAILROAD, ON THE ISTHMUS OF PANAMA,
Appellant-Plaintiff in Error,

versus No. 540.

J. J. MORROW, GOVERNOR OF THE PANAMA CANAL; H. A. A. SMITH, AUDITOR OF THE PANAMA CANAL; R. W. GLAW, PAYMASTER OF THE PANAMA CANAL; AND AGAINST THE SUCCESSORS IN OFFICE OF ALL OF THE SAID PARTIES,
Appellees-Defendants in Error.

William C. MacIntyre, Esquire, for Harvey McConaughey, et al.,

A. C. Hindman, U. S. District Attorney, for J. J. Morrow, et al.

Appeal from the United States District Court, District of the Canal Zone, returnable into the United States Circuit Court of Appeals for the Fifth Circuit, within thirty (30) days from the 5th day of January, A. D. One Thousand, Nine Hundred and Twenty-two, at the City of New Orleans, State of Louisiana, U. S. A.

TRANSCRIPT OF RECORD.

1 TRANSCRIPT OF RECORD.

United States of America,

United States District Court, in and for the Canal Zone.

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiffs,

versus No. 540

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal; and against the successors in office of all of the said Parties.
Defendants.

Attorney for Plaintiffs,—William C. MacIntyre, Esquire.

Attorney for Defendants,—A. C. Hindman, United States District Attorney.

Appeal from and Writ of Error to the United States District Court, Balboa Division, Canal Zone, January 5th, 1922.

United States of America,
Canal Zone. SS.

Pleas before the Honorable Charles Kerr, Judge of the United States District Court of the Canal Zone, at the December term thereof begun and holden at Ancon, in the Balboa Division, in the Court House of said District Court, on the 24th day of December, in the year of our Lord, one thousand, nine hundred and twenty-one.

Present: Hon. Charles Kerr, Judge.
Hon. Horace D. Ridenour, Marshal.
Hon. A. C. Hindman, United States District Attorney.

Attest:

E. M. GOOLSBY, Clerk.

And the following proceedings were had:

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2 COMPLAINT.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Div.

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal, and against the successors in office of all of the said Parties,
Defendants.

Plaintiff complains of the defendants, and alleges:

1.

The plaintiff is a citizen of the United States of America, and is a tax payer to said Government; and

plaintiff is an employee of the United States upon the Isthmus of Panama, in the service of the Panama Canal, and is domiciled in the town of Balboa, Canal Zone. And plaintiff brings this suit for himself and in behalf of all other citizens of the United States of America who are employees of the United States in the service of the Panama Canal and of the Panama Railroad, within the Canal Zone and upon the Isthmus of Panama. And the rights, interest, claims, grievances and demands of all other employes of the United States in the service of The Panama Canal and of the Panama Railroad, upon the Isthmus of Panama, as against the defendants herein, are identical with those of plaintiff, and the relief herein demanded affects all such parties equally with plaintiff, and all of such persons are interested parties in the final outcome of this suit; but plaintiff says, and shows unto the Court, that all of
3 such persons interested herein, as aforesaid, number about three thouand, (3,000), more or less, and reside at different parts of the Canal Zone, and of the Isthmus of Panama, and that it is impracticable to join all of such parties as parties plaintiff hereto.

And defendants, and all of them are employees of the United States, in the service of The Panama Canal, and all of the defendants occupy positions and are performing the duties of officials of the Panama Canal; the said J. J. Morrow being the present Governor of the Panama Canal; the said H. A. A. Smith being the present Auditor of the Panama Canal, and the said R. W. Glaw being the present Paymaster of the Panama Canal. And the plaintiff, and the defendants, and all of those in whose behalf plaintiff brings this suit, as aforesaid, are at present employed upon the Isthmus of Panama, by appointment of the President, or by his authority, in accordance with the provisions of the Act

of Congress approved August 24, 1912, known as the Panama Canal Act.

II.

That on date of June 28, 1902, an Act of Congress was approved, authorizing the President, through the Isthmian Canal Commission, by said Act created, to construct the Panama Canal and works appurtenant thereto; and by the provisions of the same Act the Secretary of the Treasury of the United States was authorized to borrow on the credit of the United States for the purpose of defraying the expenses of the work authorized by said Act, the sum of $130,000,000.00, and the proceeds of said loan were appropriated exclusively by Congress, in said Act, for the purposes in said Act specified. And by Act of Congress of August 5, 1909, (36 Stat., 117), the Secretary of the Treasury of the United States was authorized to borrow on the credit of the United States a further sum of $290,569,000.00 to be used for the construction of the said Panama Canal. And all of said monies being public monies of the United States, were appropriated by Congress and expended for the construction of the said Canal and all appurtenant works. And as part of said work or works, there were constructed from said money, so authorized and appropriated, as aforesaid, by the
4 President, through the Isthmian Canal Commission, and other persons appointed by him, by authority of law, within the Canal Zone and on other parts of the Isthmus of Panama, various quarters, or dwelling houses, for the housing and quartering of American employees of the United States engaged in the service of the said Isthmian Canal Commission, the Panama Canal and the Panama Railroad. And all of said quarters or dwelling houses builded as aforesaid,

from public monies of the United States, are property of the United States, builded, constructed, designed and dedicated to the purpose of providing free quarters and dwellings for all American citizens, employees of the United States, engaged in the service of the said Panama Canal upon the Isthmus of Panama. And the President under authority of Congress, caused the work of constructing the Panama Canal to begin in the month of of March, 1904; and from that time the President, and those acting under his authority and by his direction, caused regulations to be made, adopted and promulgated, providing that all American citizens employed by the United States upon the Isthmus of Panama in service in connection with the Panama Canal should be furnished by the United States with free quarters during their employment. And at its one hundred and twentieth meeting, held in the City of Washington, D. C., on date of February 13, 1907, the Isthmian Canal Commission, by order and authority of the President, adopted, promulgated and published certain regulations concerning general conditions of employment upon the Isthmus of Panama for employees of the United States, engaged in the construction of the Panama Canal; which said regulations, adopted and promulgated as aforesaid, for the construction of the Panama Canal, provided, among other privileges of such employees, that where practicable and in the best interests of the service, such employees should be provided with such quarters on the Isthmus of Panama as might be available from time to time. And under the provisions of said regulations all American citizens in the employ of the United States in the service of said Canal, upon the Isthmus of Panama, were provided with free quarters, builded, as aforesaid, with public monies appropriated by Congress for such purpose. That on date of August 24, 1912, while

said regulations for the construction of the
5 Panama Canal, adopted and promulgated in manner as aforesaid were still in force and effect, the Act of Congress known as the Panama Canal Act was enacted and approved. And by the Second Section of said Act it was expressly and especially made and provided as follows:

"That all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

And by further provisions of said Act, the President was authorized in his discretion, to discontinue the Isthmian Canal Commission, and to thereafter complete, govern and operate the Panama Canal, and govern the Canal Zone, or cause them to be completed, governed and operated, through a governor of the Panama Canal, and such other persons as he might deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government and protection of the Canal and the Canal Zone. And the President was further authorized to maintain and operate, through the Panama Railroad Company, or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs and supplies for vessels of the Government of the United States, and incidentally, for supplying such at reasonable rates to passing vessels, in accordance with appropriations thereby authorized to be made from time to time by Congress as part of the maintenance and operation of the said Canal. And no other business, commercial operations,

or trafficing in the name and with the property of the United States, was authorized than that hereinabove set forth. And by Section Four of said Act, the power or authority of the President to fix, modify or change any of the conditions of employment upon the Isthmus of Panama, in the service of the Panama or the Panama Railroad, was limited to authority to fix, within certain limits, the wages and salaries or compensation of of all persons necessary for the completion, care, management, maintenance, sanitation, government, operation and protection of the Panama Canal and of the Canal Zone.

And Congress, since the passage of the Pan-
6 ama Canal Act, has made no provision changing or modifying the regulations, adopted and promulgated as aforesaid by the President or by his order, for the construction of the Panama Canal, or changing the conditions of employment, or curtailing any of the privileges granted to employees in the service of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama; and Congress has not authorized any one to change, annul, modify or repeal such regulations; and especially has Congress not authorized any one to collect rent for the houses and quarters builded, constructed and designed for the free housing and quartering of the said employees; nor has Congress authorized that such employees shall be charged rent for the occupancy of said houses, dwelling or quarters. And plaintiff says and alleges that such regulations, adopted and promulgated as aforesaid, are in full force and effect and binding upon the President, and upon the defendants herein, and upon all persons appointed by the President or by his authority for the care, maintenance, management, sanitation, operation, government and protection of the Panama Canal and of the Canal Zone, and for the auxiliary works and business authorized

by Congress as aforesaid, in connection with the operation and maintenance of the Panama Canal. And plaintiff further says and shows unto Your Honor, that every year since the completion and formal opening of the Panama Canal, Congress has appropriated great sums of the public monies of the United States for the work of operation, sanitation and maintenance of the Panama Canal; and of such sums so appropriated large amounts have been expended under authority of Congress for the construction and repairs of houses and quarters, builded, constructed, designed and intended for the free housing and quartering of employees in the service of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama, and for no other purpose.

III.

And the plaintiff further says:

That the United States of America, through the President, the Isthmian Canal Commission, or the Governor of the Panama Canal, by authority of Congress,
7 in order to obtain the services of plaintiff and of all of those in whose behalf he sued, and to induce him and them to leave their homes and employment in the United States and enter the employment of the United States in the service of the Panama Canal and of the Panama Railroad, upon the Isthmus of Panama, held out, offered, promised, contracted and agreed to and with plaintiff and to and with each and every one in whose behalf he sues, that if plaintiff and all of such persons would come to the Isthmus of Panama and enter such service and employment, then, and in such event, in addition to the compensation fixed for such service by the President, or by his authority, during such employment, the United States, through

the Panama Canal, would furnish to plaintiff and to all of those in whose behalf he sues, free quarters containing all necessary articles of furniture, such as beds, mattresses, chairs, etc; and that to all of such persons who desired to bring their families to the Isthmus of Panama with them, free quarters for themselves and families, including all necessary articles of furniture, such as beds, mattresses, ranges, refrigerator, table, chair, etc. would be furnished by the United States through the Panama Canal, whenever such quarters were available upon the Isthmus of Panama. And plaintiff, and all others in whose behalf he sues, accepted in good faith such offer, promise and agreement, made to them by the United States through the President, the Isthmian Canal Commission and the Governor of the Panama Canal, by authority of Congress, as aforesaid, and did leave their homes, friends, opportunities and employment in the United States and came from the United States to the Isthmus of Panama for the purpose of entering the employment of the United States in such service as aforesaid; and plaintiff and those in whose behalf he sues are still in such employment. And upon the arrival of plaintiff and those in whose behalf he sues, at the Isthmus of Panama, free quarters were duly assigned and provided by the United States according to the said offer, promise and contract, made and accepted as aforesaid, and plaintiff and each and every one of those in whose behalf he sues are now in possession of and occupying the quarters and dwellings builded by the United States, with funds appropriated as aforesaid, for the purpose of housing and quartering all the employees
8 of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama.

And plaintiff, and each and every one of those in whose behalf he sues, have faithfully carried out, performed and fulfilled all of their part of the said con-

tract, promise and agreement, and are ready, willing and able to continue to faithfully carry out and perform all of the conditions of the said contract.

IV.

That notwithstanding the fact that all the powers and authority of Congress and of the President are defined and limited by the Constitution of the United States of America, and that neither Congress nor the President has any power, right or authority to raise, collect, receive or accept any money or revenue for the United States save and except as provided by the Constitution, and notwithstanding the fact that neither Congress nor the President may engage the United States, or its property, in any business, commerce or traffic not provided for and defined by said Constitution, the President of the United States, in excess of his power and authority and contrary to law and in violation of the contract, promise and agreement made and entered into as aforesaid, by and between the United States and plaintiff, and those in whose behalf he sues; and in utter disregard of the provisions, limitations and inhibitions of the Constitution of the United States, did, on the 3rd day of December, 1921, make, sign and publish, a certain Executive Order which is in words and figures as follows:

"By virtue of the authority vested in me it is hereby ordered:

1. Pursuant to the provisions contained in paragraph 17 of the Executive Order of February 2, 1914, fixing conditions of employment governing employees of the Panama Canal and Panama Railroad on the Isthmus of Panama, a charge will be made for rent, fuel, electric

current, water, and services in connection with quarters, on and after January 1, 1922.

Rent.

2. The rental will be based on the present average depreciated value of the area occupied by the tenant, to be determined by the Governor of the Panama Canal, The rental will be sufficient to amortize the investment in quarters on the basis of a total average life of 36 years, to return five (5) per cent for amortization and interest on the investment, and in addition cover the amount fixed for expenditure for repairs due to ordinary wear and tear of buildings and for the disposal of garbage and other services necessary from a sanitary point of view. The rental for bachelor quarters and for nonhousekeeping quarters may be fixed to include all miscellaneous services which are rendered. The rental of buildings hereafter erected shall be fixed so as to conform with rentals theretofore charged for similar buildings.

3. Charges for fuel, electric current and water, will be based upon cost; where meters are not installed, the charge for water will be based upon average consumption, and the charge for current upon the number of lamps or other devices installed.

4. Miscellaneous work, such as repainting interior of houses, repairing electric fixtures, breakage in screens, furniture and stoves, plumbing, etc., and the cutting of grass and trimming of hedges around quarters, will be done upon request of tenants and charges for such services will be made on basis of cost. And repair made necessary by reason of a tenant's misuse of the premises or any property therein, will be made by

the Panama Canal and the cost therefor collected from such tenant.

5. The Governor of the Panama Canal is charged with the duty of issuing such instructions as may be necessary to carry out this order and to fix charges as herein outlined, subject to the general instructions provided.

(Sgd.) WARREN G. HARDING.

The White House,
December 3, 1921."

And defendant J. J. Morrow, in his capacity as Governor of the Panama Canal is about to, and will, unless prevented by an order and decree of this Honorable Court, carry out and put into effect said unlawful, unconstitutional, unjust and inequitable Executive Order and to make and cause a breach of the contract, entered into, as aforesaid by and between the United States of America and plaintiff and each and every employee of the United States engaged in the service of the Panama Canal and of the Panama Railroad, upon the Isthmus, to the great and irreparable injury and damage of plaintiff and of all of those in whose behalf he sues; and said defendant has already issued an Official Circular for the Panama Canal dated at Balboa Heights, December 15, 1921, and bearing official number 627-31, (a copy whereof is hereunto attached, marked "plaintiff's exhibit A", and made a part of this Bill of Complaint), for the purpose of putting said Executive Order into force and effect against plaintiff and against all of those in whose behalf he sues.

And plaintiff, and each and every one of those
10 in whose behalf he sues, have been employed in the service of the Panama Canal, and of the

Panama Railroad, and have rendered service to the United States in such employment during the month of December, 1921, at salary, wages or compensation fixed by the President or by his authority, in accordance with the provisions of Sec. 4 of the Act of Congress known as the Panama Canal Act, of August 24, 1912. And the money for the payment of such salaries, wages or compensation has been appropriated by Congress out of the public monies of the United States, and is available to the defendants for the purpose of paying such wages, salaries or compensation, and for such purpose only. But defendants, J. J. Morrow, has issued orders and instructions unto defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster of the Panama Canal respectively, to divert certain part or parts of said money, appropriated and available as aforesaid, from the purpose for which the same has been appropriated by Congress, and, without the consent and against and over the will and protest of plaintiff, and of each and every one in whose behalf he sues, from such wages, salaries and compensation to become due and payable on date of January 1st, 1922, to deduct and withhold certain parts or sums of money as a direct federal taxation upon plaintiff, and upon each and every one of those in whose behalf he sues, for the purpose of raising revenue for the United States to amortize and give a profit in interest upon the investment of building the houses, dwellings and quarters constructed out of public monies of the United States, as above set forth, and to provide fund for the United States to assist in the works of sanitation, maintenance and operation of the Panama Canal and of the Canal Zone.

And defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster of the Panama Canal respectively, are about to and will carry out and enforce such orders and instructions, and will forcibly deduct and

withhold certain parts of the wages, salary or compensation due unto the employees in the service of the Panama Canal and of the Panama Railroad upon the Isthmus of Panama, and will collect such direct tax from them for the purpose of raising revenue for the operations of the United States upon the Canal Zone,

and to give a profit to the United States upon
11 the building of quarters for the said employees,

except and unless prevented from performing such unlawful and unconstitutional act by an Order or Decree from this Honorable Court.

And defendant J. J. Morrow, Governor of the Panama Canal, has issued orders and instructions to various of his subordinates and employees, and to defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster of the Panama Canal respectively, that, from the salaries, wages and compensation to become due and payable to the various employees in the service of the Panama Canal and the Panama Railroad, upon the first pay period of the month of February, 1922, they deduct and withhold certain amounts and sums of money, to be fixed by him or by his direction, without authority of Congress, for the payment of fuel, electric current and water, furnished by the United States unto said employees free of charge as an established privilege and custom; said deduction to be a direct taxation upon plaintiff and upon those in whose behalf he sues, for the purpose of raising revenue for the United States to assist in the the property of the United States of America, and operation and maintenance of the Panama Canal.

And defendant J. J. Morrow, Governor of the Panama Canal, has ordered and instructed his subordinates, employees and agents, and defendants H. A. A. Smith and R. W. Glaw, Auditor and Paymaster as aforesaid, that upon the first pay period of each and every succeeding month after January and February, 1922, as afore-

said, they continue to make said deductions and collections for the purpose of amortization and profit for the United States and to raise revenue for the operation and maintenance of the Panama Canal; and said defendants, and their various subordinates, employees and agents, unless prevented and estopped therefrom by an Order and Decree of this Honorable Court, will continue monthly to unlawfully withhold part or parts of said salaries, wages or compensation, as aforesaid, to the great and irreparable injury and damage of plaintiff and those in whose behalf he sues.

And defendant J. J. Morrow, Governor of the Panama Canal, without any authority of Congress and without the consent of the United States, has threatened and is about to, and will, unless prevented therefrom by an order or decree of this Honorable Court, lease, rent and let out, to persons not connected with the Government of the United States, or in its employ, certain buildings, dwelling houses and quarters, erected by the United States with funds appropriated by Congress for the operation, construction and maintenance of the Panama Canal, and for the housing and quartering of employees of the United States engaged in such service. And said defendant is about to and will constitute the Panama Canal into a real estate agency, operated as a commercial business for and on behalf of the United States, contrary to the limitations and inhibitions of the Constitution of the United States, and without any authority in law, to the great and irreparable injury of plaintiff, and of those in whose behalf he sues, and to the injury of every citizen and tax payer of the United States, with whose money such buildings were erected for a specific and designated purpose and for such purpose only.

V.

And plaintiff shows unto your Honor that plaintiff, and those in whose behalf he sues, are without any speedy or adequate redress at law, and if such unlawful acts are performed by the defendants, plaintiff and those in whose behalf he sues will be without any speedy or adequate recourse or remedy at law, because if such monies are collected and covered into the Treasury or Public Funds of the United States, they cannot be returned to plaintiff and others save and except Congress enacts a special law permitting suits to be brought against the United States for such purpose; nor could plaintiff and those in whose behalf he sues recover damages from the defendants, for the reason that the total amount of such deductions will, if permitted to be made, amount to about $500,000.00 per year, more or less, and defendants are unable to pay such judgment if recovered against them.

Wherefore, being without any remedy or speedy or adequate redress at law, plaintiff comes into this Court of Equity, where matters of this kind are cognizable, and respectfully prays that a Preliminary Injunction, as provided by the Code of Civil Procedure of the Canal Zone, be at once granted and issued, commanding the said J. J. Morrow, Governor of the Panama Canal, his subordinates, agents, employees and representatives, to refrain and desist from complying or attempting to comply with the directions contained in the aforesaid Executive Order of December 3, 1921, and to further refrain from putting into force and effect the provisions of said unlawful Executive Order; and to further refrain and desist from putting into operation, or from attempting to put into operation the orders, provisions, and directions contained in his Official Circular No. 627-31, as aforesaid; and to refrain from col-

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lecting or attempting to collect, by payroll deductions or in any other manner, charges against employees of the United States upon the Canal Zone, or Isthmus of Panama, or from withholding, or attempting to withhold from salaries, wages or compensation earned by such employees, any sum or sums of money whatsoever in the payment of charges against such employees as rent or for the occupancy of quarters belonging to the United States, or as expense for sanitation, or to provide a fund for amortization or interest upon the investment of building such quarters; or as charges for fuel, electric current or water, the property of the United States, furnished to and consumed by such employees; and commanding him to refrain from renting, letting or leasing, or attempting to rent, let or lease, any houses, dwellings, quarters or buildings, erected upon the Isthmus of Panama from funds appropriated by Congress for the construction, operation, maintenance, government, sanitation or protection of the Panama Canal or of the Canal Zone for the purpose of housing or providing quarters for employees of the United States, to any person, or persons whomsoever, not connected with the Government of the United States of America or in its employ or service. And commanding defendants H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, their subordinates, employees, agents and representatives, that they refrain from collecting, deducting, withholding or in any manner receiving, or from attempting to collect, deduct, withhold or receive, any sum or sums of money whatsoever, earned as wages, salary or compensation by employees in the service of the Panama Canal or of the Panama Railroad, for the purpose of covering charges as established in the above quoted Executive Order and the Official Circular of the Panama Canal, No. 627-31, hereto attached as exhibit "A"; and that

they refrain and desist from carrying out or putting into effect or from attempting to carry out or put into effect any of the provisions, orders, or instructions contained in said Executive Order or Official Circular
14 No. 627-31, or any orders or instructions whatsoever which they have received from the Governor of the Panama Canal, to collect, deduct or withhold any sums of money from such employees for the payment of charges established in said Executive Order and Official Circular.

And that upon a final hearing of this cause being had, the said J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and the said R. W. Glaw, Paymaster of the Panama Canal, their successors in office or interest, and their subordinates, employees, agents or representatives, and the subordinates, employees, agents and representatives of the successors in office or interest of the said defendants, be finaly, perpetually and forever enjoined, by Order and Decree of this Honorable Court from directly, or indirectly, charging, collecting, deducting, withholding or receiving, any money or monies whatsoever, or any part or parts of any wages, salary or compensation from plaintiff and from any and every employee of the United States in the service of the Panama Canal or of the Panama Railroad upon the Isthmus of Panama, for or as a charge for rent, occupancy, repairs, upkeep, interest upon investment, amortization or depreciation of any house, building or quarters, the property of the United States of America, and erected or constructed from funds appropriated by Congress from the Treasury of the United States, or from public monies of the United States, for the construction, operation, maintenance, sanitation, government or protection of the Panama Canal or of the Canal Zone; or as a charge for sanitation, collection of gar-

bage, cutting of grass, trimming of hedges, plumbing, or any work of maintenance or sanitation of the Panama Canal, the Canal Zone or any of the auxiliary works authorized by Congress; and that they, and all of them, be finally, perpetuaally and forever enjoined from putting into force and effect upon the Canal Zone, any of the provisions, orders or directions of said Executive Order of the President of December 3, 1921; and that they, and all of them be finally, perpetually and forever enjoined from leasing, renting, or letting out, to any person or persons whomsoever not connected with the Government of the United States of America, or in its employ, any house, dwelling, or building used for quarters, the property of the United States and erected with monies appropriated by Congress for the construction, operation or maintenance of the Panama Canal for the purpose of providing quarters for employees of the United States upon the Isthmus of Panama.

And that defendants may be decreed to pay the costs of this suit, and that plaintiff, and all of those in whose behalf he sues, may have such other and further relief as to this Honorable Court may seem meet and agreeable to equity.

(Sgd.) HARVEY McCONAUGHEY,
Plaintiff.
WM. C. MacINTYRE,
Solicitor for plaintiff.

United States of America,
Canal Zone, SS.
Ancon.

Harvey McConaughey, of lawful age, being first duly sworn according to law, on oath deposes and says:

I am the plaintiff named in the above mentioned complaint, and I have brought this suit for myself and for and on behalf of all other employees of the United States in the service of the Panama Canal and of the Panama Railroad, upon the Isthmus of Panama.

I have read and signed the said complaint and know the contents thereof, and the same is true, save as to those matters therein alleged upon information and belief, and as to those matters and things I verily believe it to be true.

(Sgd.) HARVEY McCONAUGHEY,
Affiant.

Subscribed and sworn to before me at Ancon, C. Z., this 24th day of December, A. D. 1921.

(Sgd.) F. H. SHEIBLEY,
Actg. Clerk of the Court.

Filed December 24, 1921, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

16 PLAINTIFF'S EXHIBIT "A".

The Panama Canal,
Executive Office.

Balboa Heights, C. Z., December 15, 1921.

Circular No. 627-31.

Superseding all Circulars of the 627 series.

Quarters for Gold Employees and American Citizens on the Silver Roll.

1. Pursuant to the provisions of the Executive Order of December 3, 1921, rent will be charged for all quarters occupied by gold employees of The Panama Canal, the Panama Railroad, other departments of the United States Government, contractors, or others who may be permitted to occupy such quarters, effective January 1, 1922, and the following will govern the assignment of quarters and the collection of rent therefor. All previous circulars of the 627 series are hereby canceled.

Applications.

2. Applications for original assignment to quarters, or for transfer, must be made on the forms provided for that purpose, and should show the date of the employee's last entrance into the service, rate of salary, and the maximum and minimum rental he is willing to pay. This application must be approved by the head of the department in which the applicant is employed and certified by the Executive Office.

3. Applications for original assignment to quarters in a district will be placed on one list according to the

employee's total length of satisfactory service, and where the length of service is equal, the salary received will determine, and opposite each applicant's name will be indicated the maximum and minimum rate of rental the employee states in his application he is willing to pay.

4. The service of employees who resigned from The Panama Canal or Panama Railroad to enter military or naval service during the European War, and who were reinstated in their positions within 120 days from date of honorable discharge, is considered continuous for the purpose of applying for quarters; while those reporting for duty after 120 days are given credit for time while in military or naval service.

5. An employee may, at the request of the head of his department, file an application for family quarters at, or transfer his application to, a district other than that in which he is employed.

6. Applications for transfer of quarters within a district must be submitted to district quartermasters on regular form through the head of department and the Executive Office, and the rules governing original assignments will be applied. Applications for transfer from without a district will be placed on the assignment list according to the date of employee's total length of satisfactory service, the same as applications for assignment within a district. Supplemental change may be made in description of quarters applied for, by writing directly to the district quartermaster.

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7. Preference will be given to families with greatest number of children above two for transfer to quarters

designated for use of families with large number of children, provided applicant had already received a regular assignment, or is at head of list for assignment.

8. Lists showing all applications on file for each district will be posted in the office of the district quartermaster and will be open for inspection.

9. The wife constitutes the family of an employee, and no consideration can be given applications for family quarters for occupancy by other members of a family than the wife, except as herein provided.

Assignments.

10. An applicant on the waiting list for family quarters, when he becomes eligible for assignment, will be given an opportunity to refuse two separate and distinct tenders of quarters, the rental of which is within the limits he states in his application. If he does not accept the second tender, his application will be canceled. An applicant will not be offered an assignment to a house which rents for more or less than the limit stated in his application.

11. Official quarters will be assigned only on approval of the Governor.

12. When an officer of the Army or Navy is detailed for duty with The Panama Canal, his application for quarters will be placed at the head of the list. After acceptance of original assignment, applications for transfer will be placed on list according to total length of satisfactory service with The Panama Canal or Panama Railroad Company.

13. Family quarters will be assigned to widow or widower employees having dependent children residing with them, in the same order as to married employees. Dependent children under this rule will not include sons more than 18 years of age in normal health, nor sons or daughters who are working and earning $40 per month or more.

14. Family quarters will be assigned to bachelors with dependent mothers in certain meritorious cases where absolute dependency is shown. Applications for such quarters must be approved by the Governor before acceptance. After approval they will be listed as regular applications for married employees.

15. Provisional assignment to family quarters may be made for periods not to exceed six months, to employees not otherwise provided for, after regular applicants have been tendered quarters. Applications for such assignments will be considered in the following order:

(a) Employees having dependent relatives only.

(b) Employees having nondependent near relatives only; i. e., children, parents, sisters, and brothers.

(c) Other employees regardless of dependents, or relatives.

(d) Aliens on the gold roll.

18 16. All family quarters distinctly and definitely within hospital reservations shall be regarded as for use of hospital physicians and nurses, and they will be given preference in assignment thereto.

The assignment shall remain under the jurisdiction of the Chief Quartermaster.

17. Where quarters have been constructed as an integral part of post offices, fire stations, police stations, railway stations, hotels, telephone exchanges, filtration plants, or in cases of quarters especially constructed by The Panama Canal in isolated localities adjacent to any activities, the operation of which necessitates the quartering of employees in close proximity thereto, they will be assigned without regard to general rules.

18. The rules applying to assignment of family quarters, their transfer, retention, etc., shall be applicable to bachelor quarters so far as practicable.

19. Exchanges in assignment between employees in different districts will be permitted when such exchanges do not interfere with the rights of other employees. These exchanges will be referred to the Chief Quartermaster for approval.

Occupation of Quarters.

20. Employees will be required to accept or reject tender of quarters within five days from date of tender.

21. When an assignment has been made in conformity with these rules, it will stand until the quarters are accepted or rejected by the employee, or until the time within which to accept or reject the tender has expired. When an employee forfeits family quarters through failure to occupy them within the prescribed time, no new application for family quarters shall be filed within 10 days after the quarters previously assigned are forfeited or released.

22. When family quarters are assigned to an employee whose family is not on the Isthmus, he will be allowed 60 days from the date of tender in which to occupy the quarters, except that an employee granted leave at the time he is tendered quarters may hold them 30 days in excess of leave granted. This does not apply in the case of transfers. Rent will be charged for quarters held.

Vacation of Quarters.

23. Employees on termination of service may occupy quarters for the balance of the month, provided rent for the entire month has been paid. Further extension may be granted on payment of rent in advance on special approval. Rent will be charged for all the time that quarters are held under this provision.

24. Family quarters may be held during the absence on leave of the employee to whom assigned, or his family or both simultaneously, for a total of six month each service year, but not to exceed six months in any one continuous period. Employees will be required to notify the district quartermaster at expiration of leave period and on date they reoccupy quarters of the total time absent during that period. (Hospital treatment excepted.) After a total of six months' allowance in one service year is used, quarters will be forfeited. Rent will be charged for such time.

19 Rental Rates.

25. Rates of rent for all quarters will be fixed by the Chief Quartermaster with the approval of the Governor, and a list showing approved rates for all quarters will be posted on bulletin boards at the offices of the district quartermasters.

26. Rentals of quarters will be collected in advance by payroll deduction and without penalty.

27. Miscellaneous charges for light, water, fuel, etc., incurred from January 1 to January 20, inclusive, will be deducted from the first payments to employees made during February, and the periods from then on will run from the 21st of one month to the 20th of the following month, both dates inclusive. Deductions will be made accordingly.

28. Employees whose basic rate of pay includes quarters, and those who are required for the good of the service to live in specially designated quarters where employed, will be granted such quarters free of charge or at such special rates as may be approved by the Governor from time to time.

29. Rent will start on the day quarters are ready for occupancy as shown in the assignment (fractional parts of the month will be figured at one-thirtieth of the monthly rate per day), and will continue until quarters are released.

30. When quarters are vacated a refund for the fractional part of the month will be made to the employee of one-thirtieth of the amount paid for rental for each day remaining in the month. Refunds will not be made for fuel, but employees may dispose of any fuel on hand to other employees if desired.

31. An employee may, with the approval of the Chief Quartermaster, sublet his quarters during his absence on leave, or sublet a part of them while he and his family occupy the other part. When so sublet, however, the employee will be responsible for the quarters

as well as the payment of rental and other fixed charges connected with the occupancy of such quarters.

32. When bachelors are forced to occupy family apartments, for the good of the service, as determined by the Chief Quartermaster, bachelor room rates will apply.

33. An employee whose duties require him to be quartered at more than one town shall pay rent only for the quarters in the town considered his headquarters, and when this can not be determined, he shall pay only the higher rental. When family quarters are occupied in such case, the rate for the family quarters will govern.

34. An employee occupying bachelor quarters in the immediate vicinity of his work and holding an assignment to family quarters elsewhere, solely for his convenience and at his request, will be charged full rental for both quarters.

35. An employee who is regularly assigned to family quarters at his place of work will not be required to pay rent for bachelor quarters while awaiting assignment to family quarters at a new station to which he is permanently transferred. If transferred temporarily for the good of the service, no additional rental will be charged for the bachelor quarters occupied temporarily.

20 **Fuel, Water, Electric Current, and other Services.**

36. The rents established for quarters include repairs to buildings occupied as quarters and removal of garbage, and do not include the use of electric current, water, or the furnishing of fuel, and separate charges

will be made therefor at such rates and subject to such conditions as may be approved by the Governor. Care of the grounds around quarters will be at the expense of occupants.

37. The use of electric appliances in quarters will be permitted under such terms and conditions as shall be determined and publihed from time to time.

Furniture.

38. The allowance of furniture for regular family quarters will be as follows:

1 range,
2 kitchen chairs,
1 chiffonier,
1 sideboard,
1 double mattress,
1 kitchen table,
2 center tables,
1 dresser,
1 double bed,
1 refrigerator,
6 dining chairs,
1 dining table,
3 rocking chairs.

39. In houses designated for use of Canal officials, the following additional articles are authorized:

3 dining chairs,
1 Morris chair,
2 towel racks,
1 parlor desk,
2 parlor chairs,

1 chiffonier,
1 porch swing,
1 parlor wicker rocker,
1 serving table,
1 dresser,
1 double porch seat.

40. The furniture allowance for bachelor quarters, per room, will be as follows:

1 single bed,
1 chiffonier,
1 single mattress,
1 table,
1 straight chair,
1 dresser,
1 rocker.

41. Nonhousekeeping quarters will be provided such furniture as may be available, but in no case more than is provided above for regular family quarters.

42. The issue of beds, mattresses, and one dresser in excess of this allowance, is authorized to families with children. Employees moving from one house to another in the same ditsrict will be permitted to take with them, at their own expense, mattresses and refrigerators.

43. When an employee living in family quarters desires to use his own furniture exclusively, a reduction of 10 per cent per month will be made in the rent. No reduction will be made, however, unless all Panama Canal furniture including refrigerators, but excepting stoves, is released.

44. Maintenance and upkeep of furniture will be at the expense of the individual occupying the quarters

where used, and such furniture will be turned over on release of the quarters in as good condition as when received, barring ordinary wear and tear. Furniture needing repairs may be exchanged at fixed rates per piece, which rate will cover reconditioning and delivery.

21 Rental of Quarters to Nonemployees.

45. When available, quarters may be rented, with the approval of the Chief Quartermaster, to other than Canal employees when their business or employment is confined to the Canal Zone, but quarters will not be considered available as long as there are Canal applicants therefor. Such assignments may be canceled on 30 days' notice when quarters are needed for Canal or Panama Railroad employees. The following surcharges will be added to the regular schedule of rentals, when quarters are rented to other than employees of The Panama Canal or Panama Railroad Company:

(a) Contractors, and their employees, officers and enlisted men of the Army, Navy, and Marine Corps, officers and employees of other branches of the United States Government, will be granted the same rates applicable to Canal employees.

(b) Outside parties who have no connection with The Panama Canal, the Panama Railroad Company, contractors, or the various branches of the United States Government service: Bachelor quarters, 100 per cent; family quarters, 200 per cent.

46. Tariff rates for individuals and companies will apply for electric current, water, fuel, etc., furnished, when the surcharges mentioned in the foregoing section are added to the regular rental.

47. Occupants will not be permitted to make any alterations on quarters, without the specific approval of the Chief Quartermaster.

48. Occupants of quarters will be held responsible for any damage beyond ordinary wear and tear to the building or property or any parts thereof by carelessness or neglect on their part, and will be required to reimburse The Panama Canal in full for such damage in an amount equal to the cost of making necessary repairs or replacing the damaged part or parts as determined by the Chief Quartermaster.

JAY J. MORROW,
Governor.

Filed Dec. 24, 1921, in office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

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22 ORDER TO SHOW CAUSE.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Division.

Harvey McConaughey, etc.,
Plaintiff,
vs. No. 540 Civil.
J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

Now upon reading and filing the verified Complaint of the Plaintiff, and it appearing unto the undersigned Judge that said Complaint states a cause of action,

and that this is a case in which it is proper that a Preliminary Injunction be granted and issue, now, upon motion of Mr. William C. MacIntyre, attorney for Plaintiff, made and heard ex parte in my chambers at Ancon, Canal Zone it is

ORDERED;

That the said Defendants, J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, be and appear, in person or by counsel, before me, at a sitting of the United States District Court for the Canal Zone, to be held in the Court House, at Ancon, C. Z., at 9:15 o'clock, December 28, 1921, in the morning of said day, then and there to show cause, if any they have, why the Preliminary Injunction in said Complaint prayed, should not be granted.

And it is further ordered that a copy of this order, with a copy of said verified Complaint attached, be served by the U. S. Marshal for the Canal Zone, or by his Deputy, upon the Governor of the Panama Canal, and the other defendants in said complaint named, and that said Marshal, or his deputy shall return this order into the office of the Clerk of this Court, not later than December 27, 1921.

Given in Chambers, at Ancon, Canal Zone, this 24th day of December, 1921.

(Sgd.) CHARLES KERR,
(Seal) United States District Judge.

Attest:

F. H. SHIEBLEY,
Acting Clerk of Court.

23 (Indorsement): Served on J. J. Morrow, Governor of The Panama Canal, H. A. A. Smith, Auditor of The Panama Canal, and R. W. Glaw, Paymaster of The Panama Canal, by delivering to each a true copy of the Complaint and Order to Show Cause, at Balboa Heights, Canal Zone, December 27, 1921.

(Sgd.) HORACE D. RIDENOUR,
U. S. Marshal.
By FRANK T. HAMLIN,
Deputy U. S. Marshal.

Marshal's Fees:

Service	$3.00
Mileage	.60
Additional words in Complaint	14.40
	$18.00

Filed December 27, 1921, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

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24 MINUTES.

On this twenty-eighth day of December, A. D., 1921, the United States District Court of the Canal Zone is duly convened pursuant to adjournment in the Court House at Ancon, in the Canal Zone, the same being the tenth session of the December term, 1921, of the said Court for the Division of Balboa.

Presiding, Honorable Charles Kerr, United States District Judge; present Honorable A. C. Hindman, District Attorney, Honorable Horace D. Ridenour, Marshal, by his deputy, Frank T. Hamlin; and the Clerk of the

Court, by deputy clerk, F. H. Sheibley; and the following proceedings are had, to-wit:

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,

Plaintiffs,

vs. No. 540.

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal; and against the successors in office of all of the said parties;

Defendants.

INJUNCTION.

This day the parties to this cause are in open Court, respectively by their attorneys, and the case being called for hearing on the defendant's motion to dismiss, and having been heard thereon, the Court announces that the case will be submitted on the question of jurisdiction, and that judgment of the Court will be rendered as soon as the Court can reach a conclusion.

There being no other business before the Court, Court is adjourned until January 3, 1922, at 9:15 a. m.

25 MOTION TO DISMISS.

United States of America, Canal Zone.

In the District Court in and for the Division of Balboa, Canal Zone.

Harvey McConaughey, for himself and in behalf of all other employees of The Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiff,

vs. Civil No. 540.

J. J. Morrow, Governor of The Panama Canal; H. A. A. Smith, Auditor of The Panama Canal; R. W. Glaw, Paymaster of The Panama Canal, and against the successors in office of all of the said parties;
Defendants.

Come now the above-named defendants, J. J. Morrow, Governor of The Panama Canal, H. A. A. Smith, Auditor of The Panama Canal, and R. W. Glaw, Paymaster of The Panama Canal, by their solicitor, A. C. Hindman, and appearing especially for the purposes of this motion and for no other, and without submitting to the jurisdiction of the Court, move this Honorable Court to quash the order to show cause heretofore issued, and to dismiss the bill of complaint heretofore filed in the above-entitled cause, for the following reasons, to-wit:

1.

That this Court is without jurisdiction of the subject matter of the said bill, in that it appears from said bill that it is a suit to enjoin the collection of funds for

and on behalf of the United States and for deposit in the Treasury of the United States, and is, therefore, in effect a suit against the United States.

2.

That this Court is without jurisdiction of the subject matter of the said bill and of the persons of these defendants, for the reason that it appears from said bill that said defendants are officials of the Executive Branch of the Government of the United States, and in the matters complained of in said bill are acting in their respective official capacities by and under the direction of the President of the United States. That this Court has no jurisdiction to enjoin the President of the United States, or any other person carrying out his orders in their official capacities.

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3.

That the Executive Branch of the United States Government and the Judicial Branch of the United States Government are co-ordinate branches, and there is no jurisdiction in this Court to enjoin a co-ordinate branch of the United States Government in the exercise of its executive discretion.

A. C. HINDMAN,
Solicitor for Defendants.

Filed December 28, 1921, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

27 MINUTES.

On this 5th day of January, A. D. 1922, the United States District Court of the Canal Zone is duly convened pursuant to adjournment in the Court House at Ancon, in the Canal Zone, the same being the second session of the January term, 1922, of the said Court for the Division of Balboa.

Presiding, Honorable Charles Kerr, United States District Judge; present Hon. J. J. McGuigan, Assistant District Attorney, Hon. Horace D. Ridenour, Marshal, by his Deputy, Frank T. Hamlin; and the Clerk of the Court, by deputy Clerk, F. H. Sheibley; and the following procedings are had, to-wit:

Harvey McConaughey, for himself and in behalf of all other employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiffs,

vs. No. 540.

J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal; and the successors in office of all of the said parties;
Defendants.

The Court this day renders and files its Opinion on the motion to dismiss interposed by the defendants, and said motion is sustained.

Whereupon plaintiff by his attorney, William C. MacIntyre, prays that he be allowed to note and reserve his exceptions to the ruling of the Court sustaining said motion; and the Court orders that his said exceptions

may be noted and reserved, and made a part of the record herein by his Bill of Exceptions.

Whereupon the Court enters his final judgment herein, ordering the dismissal of this action, which said final judgment is in words and figures as follows:

(Omitting Caption).

And now the Court having filed its opinion and made its order herein, sustaining defendant's Motion to Dismiss, it is therefore,

Ordered, adjudged and decreed, that this cause be and the same is hereby dismissed, without costs.

Given in open Court, at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
United States District Judge.

28 And thereafter, plaintiff by his said attorney, prays that he may note and reserve to said final judgment, order and decree all of the exceptions already reserved by him to the ruling of the Court in sustaining the motion to dismiss; and the Court orders that all of said exceptions may be noted and reserved by Bill of Exceptions to be filed herein and made a part of the record in this cause.

And thereafter, plaintiff by his attorney, presented to the Court for approval his Bill of Exceptions herein, and the Court orders that the same be approved and filed as part of the record herein, which is accordingly done.

And now comes the plaintiff by his counsel and prays the Court to be allowed to appeal from said final decree and judgment to the United States Circuit Court of

Appeals for the Fifth Circuit, and files his prayer for appeal accompanied by his affidavit on appeal and his assignments of error; and he likewise prays that he may be allowed a Writ of Error in this cause from the said United States Circuit Court of Appeals for the Fifth Circuit.

And the Court grants said appeal and writ of error and signs in open Court the orders therefor, and the attorney for the defendants waives any notice of the application for appeal and writ of error.

And thereafter, the plaintiff by his said attorney moves the Court for a bond to act as supersedeas bond, whereupon the Court holds and rules that he is without authority or jurisdiction to fix a supersedeas bond in this cause. Whereupon plaintiff by his said attorney moves the Court that plaintiff be granted a restraining order, restraining defendants from covering into the Treasury of the United States or paying into the public funds of the United States any monies which may be withheld or deducted from the salaries or wages of plaintiff and his co-plaintiffs, pending final decision of this cause upon appeal. Whereupon the Court overrules said motion, and states that the Court being without jurisdiction in this cause is without jurisdiction to make or enter any order herein against the defendants.

Whereupon plaintiff by his said attorney prays the Court to fix the amount of the bond on appeal, which the Court thereupon fixes in the sum of five hundred dollars ($500.00), and the Court furthermore orders that said bond shall be signed by such sureties as may be approved by the Court.

The pleadings, motions, and orders herein made are in the following words and figures, to-wit:

29 OPINION OF COURT ON MOTION TO DISMISS.

United States of America.

[Figure of Eagle.]

United States District Court in and for the Canal Zone Balboa Division.

Harvey McConaughey, for himself and in behalf of all other employees of The Panama Canal and the Panama Railroad, on the Isthmus of Panama,
Plaintiff,
vs. Civil No. 540

J. J. Morrow, Governor of The Panama Canal; H. A. A. Smith, Auditor of The Panama Canal; R. W. Glaw Paymaster of The Panama Canal; and against the successors in office of all of the said parties;
Defendants.

The plaintiff, on behalf of himself and all others similarly situated, has filed an action against J. J. Morrow, Governor of the Canal Zone; H. A. A. Smith Auditor, and R. W. Glaw, Paymaster, seeking to enjoin them from deducting any portion of their pay a employees of The Panama Canal or the Panama Railroad, for rentals and other charges, fixed by the Cana Zone authorities, pursuant to an order of the President of the United States, in an Executive order of the President bearing date of the 3rd of December, 1921, which order is in the words and figures following:

"By virtue of the authority vested in me it is hereby ordered:

1. Pursuant to the provisions contained in paragraph 17 of the Executive Order of February 2, 1914, fixing conditions of employment governing employees of the Panama Canal and Panama Railroad on the Isthmus of Panama, a charge will be made for rent, fuel, electric current, water, and services in connection with quarters, on and after January 1, 1922.

Rent.

2. The rental will be based on the present average depreciated value of the area occupied by the tenant, to be determined by the Governor of the Panama Canal. The rental will be sufficient to amortize the investment in quarters on the basis of a total average life of 36 years, to return five (5) per cent for amortization and interest on the investment, and in addition cover the amount fixed for expenditure for repairs due to ordinary wear and tear of building and for the disposal of garbage and other services necessary from a sanitary point of view. The rental for bachelor quarters and for nonhousekeeping quarters may be fixed to include all miscellaneous services which are rendered. The rental of buildings hereafter erected shall be fixed so as to conform with rentals theretofore charged for similar buildings.

3. Charges for fuel, electric current and water, will be based upon cost; where meters are not installed, the charge for water will be based upon average consumption, and the charge for current upon the number of lamps or other devices installed.

4. Miscellaneous work, such as repainting interior of houses, repairing electric fixtures, breakage in screens, furniture and stoves, plumbing, etc., and the cutting of grass and trimming of hedges around quarters, will be done upon request of tenants and charges for such services will be made on basis of cost. Any repairs made necessary by reason of a tenant's misuse of the premises or any property therein, will be made by The Panama Canal and the cost therefor collected from such tenant.

5. The Governor of the Panama Canal is charged with the duty of issuing such instructions as may be necessary to carry out this order and to fix charges as herein outlined, subject to the general instructions provided.

(Sgd.) WARREN G. HARDING."

The defendants have moved to dismiss the action for the following reasons:

1. That this Court is without jurisdiction of the subject matter of the said bill, in that it appears from said bill that it is a suit to enjoin the collection of funds for and on behalf of the United States and for deposit in the Treasury of the United States, and is, therefore, in effect a suit against the United States.

2. That this Court is without jurisdiction of the subject matter of the said bill and of the persons of these defendants, for the reason that it appears from said bill that said defendants are officials of the Executive Branch of the Government of the United States, and in the matters complained of in said bill are acting in their respective official capacities by and under the direction of the President of the United States. That this Court has no jurisdiction to enjoin the President

of the United States, or any other person carrying out his orders in their official capacities.

3. That the Executive Branch of the United States Government and the Judicial Branch of the United States Government are co-ordinate branches, and there is no jurisdiction in this Court to enjoin a co-ordinate branch of the United States Government in the exercise of its executive discretion."

The purpose for which a statute is enacted will frequently aid in determining its true import and meaning. The Canal Zone Government is the result of a series of Congressional enactments, supplemented, from time to time, by sundry Executive Orders, promulgated pursuant to powers conferred on the President by the acts themselves.

The Canal Zone, as it is commonly designated, was acquired by the Government of the United States for a predetermined purpose. The acts of Congress and the Executive Orders issued pursuant to the powers conferred in such acts, are in aid of that purpose. All rules and regulations that have been established by legislative or executive enactment bear an immediate relationship to that purpose. From the outset both the legislative and executive branches of government have been involved. As to them it has been a co-
31 ordinated undertaking, each acting in harmony with the other. Congress has exercised little or no supervisory power, preferring rather to confer that power upon the executive. In consequence such rules and regulations as have been enacted and established from time to time for the construction, operation and maintenance of what is known as the Panama Canal have been promulgated by the executive, acting under direct authority from the legislative. The first act of

Congress, approved June 28, 1902, authorized the President to acquire from the New Panama Canal Company, of France, all of its rights, franchises, property, real and personal, its stock in the Panama Railroad, and everything of value which it possessed, for the stipulated sum of forty millions of dollars, and to acquire such additional territory as Congress directed, for the definite purpose of constructing an Isthmian waterway from the Caribbean Sea to the Pacific Ocean, and such additional territory as might in his judgment be necessary for the purposes intended. By this same act there was created an Isthmian Canal Commission for the sole purpose of enabling the President to construct such canal and the words appurtenant thereto, the supervisory power of the President over that Commission being provided in the following language:

"Said Commission shall in all matters be subject to the direction and control of the President, and shall make to the President annually, and at such other periods as may be required, either by law or by the order of the President, full and complete reports of all their actings and doings. * * *"

Section 2, of the Act of April 28, 1904, makes this further provision with reference to the powers of the President:

"That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or

persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

"Approved, April 28, 1904. (33 U. S. Stats., 429.)"

The Act of August 24, 1921, commonly designated as the "Panama Canal Act", confers additional powers upon the President, in addition to confirming his previous acts. Section 2 of that act provides as follows:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. * * *"

In anticipation of the early completion of the undertaking, and in consequence thereof the abolition of the Isthmian Canal Commission, even greater powers were conferred upon the President at the conclusion of the functions of that Commission. Section 4 of that Act makes the following provision with reference thereto:

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"That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive Order to discontinue the Isthmian Canal Commission which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern

the Canal Zone, or cause them to be completed, governed and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. * *"

Section 7 defines the powers and duties of the governor as follows:

"That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. * * *"

A careful examination of this Act discloses the fact that while Congress reserves the right to modify existing rules and regulations, or to create new ones, there is nevertheless conferred upon the President, in reality, the entire management and control of the operation and government of the Canal and the Canal Zone, and all subsidiary agencies.

These various Acts have been alluded to and quoted from for the purpose of indicating the extent to which Congress has gone, from the first inception of this undertaking, in conferring upon the President not only unlimited control but unlimited discretion in all matters of construction, maintenance, operation and government.

Therefore, as incident to and as the coefficients of these powers, the further right to establish all rules and regulations that may be deemed necessary to effectuate the purpose intended by these grants of power, follows as a natural consequence.

From the foregoing recitals it will be seen that Congress, having by appropriate legislation authorized the building of the Panama Canal, and made all necessary appropriations therefor, in effect created the President of the United States an attorney in fact to
33 supervise and control the actual work of construction. This power was not granted to Theodore Roosevelt, or William H. Taft, or Woodrow Wilson, or Warren G. Harding, but to the President of the United States, thus delegating to the executive, in addition to the constitutional powers which he possessed, an unlimilted statutory power. Out of this anomoly has arisen the question which is now presented to the Court. It will not be argued that Congress can create an instrumentality of government and confer upon that instrumentality powers of legislation which have been exclusively delegated to it by the Constitution. Neither can it delegate such powers to any department of government already in existence. When the power to create and the power to execute are both lodged in the same functionary independent sovereignty ceases to exist. If, therefore, Congress actually, or even constructively, conferred upon the executive, in any of the above recited Acts, these powers of legislation which belonged exclusively to it, to the extent of such delegation it was an unconstitutional act, and, therefore, inoperative. Clearly the powers exercised by the President in constructing, and therefore in operating, the canal were statutory rather than constitutional. This being true these powers which are purely political, and which are derived from the Constitution, as a

rule, will be eliminated from this consideration. The Courts are practically unanimous in holding that a Court of Equity cannot restrain an executive from exercising that authority which is derived from the organic law, neither can they compel him to act if he refuse. The status of the President, and the nature of the authority delegated to him, and under which he has acted, must be determined from contemporaneous construction and from the language of the Acts themselves. The power to treat with an independent government for the territory embraced in the Zone, and to contract for the building of a canal thereacross, was not a Constitutional power possessed by the President. Congress had the power to create any individual its attorney in fact. In conferring that power upon the President, however, there has been created a perplexity of status that does not seem to have hitherto arisen. Was it the intention of Congress that the President should act in his individual or in his executive capacity in the exercise of these powers which it conferred? Upon a determination of this question the jurisdiction of the Court may, in part, depend.

In determining its jurisdiction the Court may give consideration to what it regards as the three most important features involved. Briefly stated they are:

34 1. Do the acts of Congress prescribe the performance of mere ministerial duties by the President, or do they confer upon him powers involving his individual judgment and discretion?

2. Have the complainants acquired such legal rights in the subject matter involved that they may maintain an action in equity to restrain any interference therewith?

3. Is this an action against the President of the United States? If so, has this Court jurisdiction to command or restrain him?

These propositions will be considered in the order stated.

The first proposition involves a consideration of those acts which are purely ministerial and those involving the exercise of judgment and discretion. What are ministerial and what are judicial acts have been variously defined. The most important criterion, perhaps, is that the duty is one which has been positively imposed by law, and its performance required at a time and in a manner or upon conditions, which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."—Mechem, Pub. Offi., Sec. 657. "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to judicial discretion. It is a simply definite duty arising under conditions admitted or proved to exist, and imposed by law"—Mississippi v. Johnson, 4 Wall. 475. "Where the law describes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial."—Gen. Land Office v. Smith, 5 Texas 471. "Discretion in the manner of the performance of an act arises when an act may be performed in one or two or more ways either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But, when a positive duty is enjoined, and there is but one way in which it can be performed lawfully, then there is no discretion."—State v. Brooks, 6 L. R.

A. (N. S.) 762. "A ministerial duty is one in respect to which nothing is left to discretion."—Sullivan v. Shanklin, 63 Cal. 247, 251. Numerous definitions might be cited, but they would all be to the same import. From these and such additional definitions as might be quoted, a few simple propositions may be stated, concerning which there can be no argument; (a) A mandatory writ will lie to compel the performance of an act which the law specifically enjoins; (b) unless the act so enjoined by law be ministerial the writ will not lie; (c) a writ will not lie to compel or prevent the performance of a judicial or discretional act; (d) where an act is specifically enjoined by law, but the manner of performing it is discretionary, or involves judicial action, a writ will lie to compel performance, but will not lie to compel performance in a particular manner.

Following these definitions and the rules deduced therefrom it becomes important to determine whether the acts of Congress conferred upon the President mere mininsterial duties, or whether they conferred upon him duties involving the exercise of judgment and discretion. If the former, as an individual, separated from the office of executive, has he failed to perform those duties, or is he about to perform them in an illegal way? If so, the question of injunction sought by the complainants may be considered; if not, they are with out the jurisdiction of a Court of equity. For a determination of the character of these duties thus imposed, we may look not alone to the language of the acts, but to the interpretation placed thereon by the President, and the acquiescense in that interpretation by Congress. It will be seen from the excerpts above made that the several acts contain such expressions as "all rules and regulation necessary for the government of the Canal Zone ... shall be exercised in such manner as the President shall

direct",—Sec. 2, Act of April 28, 1904; "when in the judgment of the President the construction of the Canal shall be sufficiently advanced ..... the President is authorized thereafter to complete, govern, and operate ....."—Act of August 24, 1912. Throughout, the several acts of Congress abound with similar expressions. Words lose their import and interpretation becomes a whim of the fancy if this language could be so construed it would imply the imposition of a duty to do a certain thing in a certain way, without recourse to either judgment or discretion. Nor has it been so construed by any of the Presidents. In a letter addressed to William H. Taft, then Secretary of War, dated May 9, 1904, President Roosevelt interpreted the Act of Congress as authorizing him to " excavate, construct, and complete a ship canal from the Caribbean Sea to the Pacific Ocean", and "to make all needful rules and regulations for the government of the canal zone, and all the rights, powers and authority granted by the Canal Convention to the United States, until the close of the Fifty-eighth Congress". Each of the four Presidents have in
36 turn adopted the phrase "By virtue of the authority vested in me by law" as a prefactory introduction to each order issued by him, thus clearly indicating an interpretative version in harmony with an unlimited discretion . If, then, Congress did confer upon the President the doing of a thing that involved personal judgment and discretion can a Court of equity interpose? Among the authorities there is little or no conflict. Only a few of the leading cases may be noticed.

In Decatur v. Paulding, 14 Pet. 497, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government

in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act. That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the Courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The Court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any
37 foundation for the claim that mandamus may therefore be awarded. The responsibility as

well as the power rests with the Secretary. Uncontrolled by the Courts.

In the case of People etc., v. Sutherland, 18 Am. Rep. 90, Judge Cooley has discussed this subject in a way that leaves no room for doubt. Only a few extracts therefro mwill be necessary to indicate its application to the present hearing:

"Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and, within their respective spheres of action, equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executd. This division is accepted as a necessity in all free government, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the Courts to take upon themselves his duties."

Another case in point is that of Louisiana v. McAdoo, 234 U. S. 629:

"There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the Courts will refuse to substitute their judgment or discretion for that

of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government. Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Randall v. U. S., 12 Pet. 524, 610, 9 L. ed. 1181, 1215; U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167, are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are Decatur v. Paulding, 14 Pet. 497, 514, et seq., 10 L. ed. 559, 567; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Cunningham v. Macon & B. R. Co., 109 U. S. 446, 27 L. ed. 992, 3 Sup Ct. Rep. 292, 609; U. S. ex. rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; U. S. ex rel. International Contracting Co.. v. Lamont, 155 U. S. 303, 39 L. ed. 160; 15 Sup. Ct. Rep. 97; Roberts v. U. S., 176 U. S. 221, 41 L. ed. 443, 20 Sup. Ct. Rep. 376; U. S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U S. 316; 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; U. S. ex rel. Ness v. Fisher, 223 U. S. 683, 56 L. ed. 610, 32 Sup. Ct. Rep. 356."

Likewise the case of Decatur v. Paulding, 14 Pet. 497, involving the interpretation of a resolution of Congress:

"The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is from

time to time required to act ..... If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their
38 judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matter committed to his care, in the ordinary discharge of his official duties. ..... The interference of the Courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

Authorities to the same effect could be multiplied to an unlimited extent, but without here making further recital it may be said that only in those instances where a plain ministerial duty has been prescribed may its performance be enforced, or action under it enjoined by a Court of equity, unless the act creating the duty itself be unconstitutional, a phase of the subject that will be hereafter noticed. It is manifest, therefore, that unless there exist some violation of the authority conferred neither this nor any other Court would have jurisdiction to grant the relief sought.

There is no rule of law beter established than that which requires the complainant in an action seeking injunctive relief to have a property interest in the subject matter of the action. It is alleged by the complainants that as an inducement to them to enter into the services of The Panama Canal and its accessories there was held out to them by the President, the Isthmian Canal Commission, and the Governor of the Canal Zone the inducement that they would be furnished free quarters, free lights, free water, and sundry other privileges in addition to the emoluments which they would receive for their services; that these inducements were a part of the consideration which they were to be paid and but therefor they would not have entered into the employment thereof, and that by virtue of the contractual relations thus established between them and the United States they have acquired a property right in the use and occupation of the quarters which they occupy and to which they were assigned that cannot now be taken from them, except through the impairment of an existing contract. In this connection it will be necessary to notice such documentary history as the Court has been able to discover bearing upon the question of free rentals and other privileges incident thereto.

Act No. 8 of the Executive Branch of the Canal Zone Government, bearing date September 2, 1904, contains this provision:

39 'By authority of the President of the United States, be it enacted by the Isthmian Canal Commission: * * *

Sec. 53. The employes in the service of the Government of the Canal Zone stationed on the Isthmus whose salaries are $1,000.00 or more per year shall be entitled to quarters, or in lieu thereof in each case to a sum

equal to 8 per cent. of the annual salary, at the option of the Commission." * *

So far as the Court is advised this is the first reference made to the subject of free rentals. On the 2nd day of February, 1914, Executive Order No. 1888 was issued by President Wilson, and that order contains this provision:

"By virtue of the authority vested in me by law, it is hereby ordered that the general conditions of employment governing employees on the Isthmus of Panama, necessary for the completion, care, management, maintenance, sanitation, government and operation of the Panama Canal, the Canal Zone, the Panama Railroad, and other adjuncts, shall be as follows:

17. Where practicable, such bachelor quarters on the Isthmus as may be available from time to time will be assigned all employees desiring them. Family quarters, when available, will be assigned under such rules as may be prescribed by the Governor. A charge will be made for rent, fuel, and electric current at such time, and in accordance with such regulations as the President may hereafter establish."

On the 15th day of January, 1915, President Wilson issued Executive Order No. 2120, which order contains this provision:

"By virtue of the authority vested in me it is hereby ordered:

8. The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of em-

ployes, but revocable privileges, which is has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the basis for increasing salaries or wages or otherwise increasing compensation."

On the 25th day of May, 1915, Executive Order No. 2204, was published by the President:

"By virtue of the authority vested in me, it is hereby ordered that the Executive Order of January 15th, 1915, relative to charges for rent, fuel and electric current furnished employes of the Panama Canal and the Panama Railroad Company on the Isthmus of Panama, is modified by suspending from the operation thereof so much as relates to rent, fuel, and lights during the period of actual construction of the Panama Canal, but not later than June 30, 1916."

These several orders, read in connection with the allegations of the petition asserting a property right in the privielge of free rentals, free fuel, and free lights, leave a gap that has not been filled. In view of the fact that the President, as far back as February 2, 1914, announced that a charge would be made covering these privileges hitherto allowed in accordance with such regulations as the President might thereafter establish; and in view of the further fact that the President on the 15th day of January 1915 did issue an order withdrawing these privileges and in so doing explicitly stated they were not "vested or contract rights of employes but revocable privileges": and in view of the yet further fact that on May 25, 1915, the President in restoring these privileges expressly stated that they would be continued only during the period of actual contruction, and in no event

later than June 30, 1916, upon what act of any one of the Presidents is based the allegation of a contractual relationship with respect to these privileges? For a period of almost eight years there has been an outstanding notice from the President that there existed the right to withdraw these privileges, and that no vested or contract rights had been or could be acquired therein. In view of these facts how did, or how could the employes of the United States acquire a vested or property right of any kind in these privileges? On the contrary did they not accept employment with notice that they could not acquire such privileges? It is urged that the act of the Isthmian Commission, bearing date of September 2, 1904, Sec. 53, above quoted, conferred the privilege in the first instance, and the rights now asserted were acquired by virtue of that act. Is this position tenable? The order of President Roosevelt calling the Isthmian Canal Commission into being expressly provides that every act passed by that Commission shall be preceded by the caption "By authority of the President of the United States", it being the purpose and intention of the President not to grant to this or any other auxiliary, power over which he might not exercise supervision. Manifestly, then, the acts of the Commission, from the outset, were the acts of the President, and when the Commission ceased to exist the President was left in the same position as if there had never been a Commission. That it was the intention of Congress to hold the Commission in subservience to the President is clearly indicated by the language of the act creating it, which provides that "said Commission shall in all matters be subject to the direction and control of the President." It is contended, however, that the Panama Canal Act, Sec. 2, heretofore quoted, ratifies the act of the Commission in establishing free rentals, and that the President is powerless to revoke

that privilege without authority from Congress. The language of the act is "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide." It will be observed this ratification
41 is limited to such rules, regulations, etc., as had been promulgated for the "government, sanitation and construction" of the Panama Canal. Did this include the privilege of free quarters? If so, it included also every rule and regulation promulgated and established by either the Commission or the President during the construction period. If the privilege or rent was included the established scale of wages and many other similar rules then existing were also included. If it were a question vital to this issue it might be urged with force and reason that many of the acts of the Canal Commission were clearly unconstitutional. That Congress could not delegate to a commission appointed by the President the right to legislate with reference to the life, liberty and property of citizens of the United States in matters where Congress alone could act, will hardly be questioned, and when the Canal Commission undertook, even with the sanction and authority of the President, to establish a code of laws that involved the life and property of the citizen, it went beyond its jurisdiction, and to cure this evident exercise of a power it did not possess and that could not be delegated to it, Congress found it necessary to ratify the laws the Commission had established until such time as Congress might otherwise decree. But certainly Congress did not intend to give statutory sanction to every rule and regulation established by the Commission and the President during

the construction period of the Canal, and to hold such rules and regulations binding after construction. The sanitation regulations, port regulations, tariff schedules, transportation rates have been made the subject of constant change. This could not have been done if every rule and regulation prior to 1912 received the statutory sanction of Congress in the ratification clause of the Panama Canal Act, and were now binding. It cannot be said that the ratification act applies to one rule or regulation and does not apply with equal force to all the others. The Attorney General on June 19, 1916, in construing the term "compensation" with relation to the privileges enjoyed by the employes of the Canal impliedly concurred with the conclusions reached by the President in the Executive Order of January 15, 1915, in holding that rental and other privileges were revocable at the will of the President. Since, then, the power to enact carries with it the power to repeal has the President exceeded his authority in withdrawing a privilege declared by his predecessor to be revocable? Has not Congress by its silence acquiesced in the acts of a former President, and in the construction placed by him on his powers of revocation?

42 In this connection the opinion of Attorney General Bonaparte, dated January 30, 1907, 26 Op. 119, may be considered as bearing upon the conclusions reached by President Wilson. Some doubt had arisen in the mind of the Secretary of War with reference to the rights of the President upon failure of the Fifty-eighth Congress to enact additional legislation for the government and control of the Canal Zone. In response to an inquiry from the Secretary of War the Attorney General said: "In my opinion the President may now, directly or through the persons appointed and employed by him to govern the Zone and build the Canal, adopt needed rules and regulations for

the government of the Canal Zone, and that he has not lost the power to modify any of the rules and regulations established by the Canal Commission prior to the expiration of the Fifty-eighth Congress." And again in this same communication the Attorney General says: "There is nothing in this act, approved April 28, 1904, or in any other act of Congress relating to this subject-matter, which discloses any purpose on the part of Congress to give to determinations of the Isthmian Canal Commission a peculiar permanency, or to exempt them from modification or rescision in the discretion of the President." That the act of 1912 did not take from the President the power to rescind existing privileges concerning rents has clearly been the opinion of the several Presidents since the passage of that act. If President Wilson had thought he possessed no power of regulation or rescision, it is not conceivable that he would have said in the order of May 25, 1915, rescinding the order directing the collection of rents, that the rescision should in no event be operative beyond June 30, 1916. Reverting to the fact that to assume that it was the purpose and intention of Congress in the act of 1912 to withdraw from the President any control over the subject of rentals, and other privileges, is to assume that it was equally the purpose and intention of Congress to withdraw from the President control over any of the exiting laws and regulations of the Isthmian Canal Commission at the time of the passage of the act in question. Clearly Congress had no such intention, nor has any of the Presidents ever attributed any such intention to Congress. If, then, Congress did not withdraw the power of revision from the President the order of President Harding is otherwise legal, and the complainants have not now and have never had an irrevocable interest in these privileges.

That they have no right of action, if this be

43 true, will not be disputed. Rose, in his notes on the case Marbury v. Madison, concludes, after a review of the cases, that two things must concur: "First, a clear, legal right to have the thing done, to compel the doing of the thing for which the writ is sought; and, second that there is no other adequate legal remedy by which the specific performance of the duty can be enforced." High on Extraordinary Legal Remedies, Sec. 431, lends added strength to the rule. A collection of the leading authorities in support of this proposition will be found in the text of the above authors as indicated.

The Court having advanced thus far in its considerations and conclusions only a brief discussion of the third proposition will be necessary. This is an action against the Governor, the Auditor and the Paymaster of the Canal Zone. The Governor is an appointee of the President, and the other two are appointees of the Governor. The act complained of is based on an order is- of the Canal Zone. The defendants are merely the agents of the President for the enforcement of his orders. They have no interest personal to themselves in the controversy, except as they may incidentally be subject to the operation of the order itself. "When the head of a department acts as a mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the Courts than the chief executive himself."—People v. Governor, 18 Am. Rep. 95. As heretofore expressed, the powers asserted by the President are derived from an act of Congress and not from the Constitution. The delegation of power is to the office of President and not to the individual. It is to be assumed that Congress acted under the assumption that one selected by the people to hold the highest office created by the Con-

stitution would be competent to discharge the duties imposed in its acts with reference to the construction and operation of the Canal. Whether Congress considered the effect of a delegation of power to the office rather than the individual may be doubted, but that there is a marked difference may not be doubted. The significance of such a discrimination is clearly set forth by Judge Cooley in the last mentioned case, when he says:

44 "The apportionment of power, authority and duty to the governor, is either made by the people in the constitution, or by the legislature in making laws under it; and the Courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purpose of this jurisdiction, the Courts may treat it precisely as if an inferior officer has been required to perform it. To do this would not only be to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the Courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

Another case bearing upon this phase of the subject is that of Wilson v. Louisiana Purchase Commision, 133 Iowa 568. In this action the plaintiff claimed that there

was due him the sum of $200.00 under a contract with this Commission. This commission was formed by an act of the legislature. Among the duties delegated to it was the auditing and passing upon the validity of claims presented for payment, which claims, when allowed, were to be paid by the state. Plaintiff alleged the performance of certain services, and the refusal of the commission to allow his claim. Among other defenses it was claimed this was in effect an action against the state, the commission being its delegated agent. In discussing the subject the Court said:

"The Louisiana Purchase Exposition Commission was a creature of the state, created for the specific purpose of representing the state and its interests at the exposition bearing its name. All expenses incurred by it in the execution of its delegated powers were payable from the funds of the state set apart by legislative authority for that express purpose. The commission was clearly but an agent of the state through whom the public funds were to be disbursed, and this disbursement was authorized by law only upon the exercise of the discretion and judgment of the commission. While the state is not named as a party in the action, it is quite clear to us that it is in fact the actual party in interest. If the writ prayed for were to be issued, it would compel the defendant to make a draft upon state funds; in other words, the effect thereof would be to compel the state itself to pay the plaintiff's claim, which is an unliquidated demand for which no specific provision has been made from state funds. It is fundamental that a state cannot be sued in its own Courts without its consent, and it is a further rule that a litigant will not be permitted to evade the general rule by bringing action against the servants or agents of the state to enforce satisfaction for claims."

In the recent case of Louisiana v. William Gibbs McAdoo, Secretary of the Treasury of the United States, 234 U. S. 629, there is a strong reaffirmation of this same doctrine:

"That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not
45 always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered."—Minnesota v. Hitchcock, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; Kansas v. United States, 204, U. S. 331, 333, 51 L. ed. 510, 27 Sup. Ct. Rep. 388.

Under the allegations of the petition the immunity claimed by the plaintiffs grows out of an implied contract on the part of the United States, made through the President, with the employes of the government of the Canal Zone. Without authority, it is claimed, the President has issued an order which impairs the rights acquired under that implied contract. If this Court adheres to the rulings announced in the foregoing cases, it must conclude that this is an action against the President of the United States, or the United States, or both. The defendants named are only nominal parties, and not the real parties in interest. Reverting again to the McAdoo case we find the law this clearly stated by Judge Lurton:

"No principle is better established than that the United States may not be sued in the Courts of this country without its consent. If, therefore, this be a suit against the United States, the state, though entitled

as a state to appeal to the original jurisdiction of this Court, must show some authority from Congress under which such a suit may be brought, or leave to file must be denied.—U. S. v. Clarke, 8 Pet. 436, 8 L. ed. 1001; U. S. v. Lee, 106 U S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Kansas v. U. S., 204 U. S. 331, 333, 51 L. ed. 510, 27 Sup. Ct. Rep. 388."

This case follows the earlier case of Beers v. Arkansas, 20 How. 993, 15 L. ed:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own Courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

A multiplication of authorities upon this subject is not regarded as essential. Something may be said in answer to the argument of counsel for complainants, and some notice may be taken of a few of the authorities upon which reliance is placed. It is claimed that the President is acting in excess of authority, and therefore an action will lie to restrain him from so doing, the fact that he is President being immaterial. Under the conclusions reached by the Court this would be true if he were acting under an unconstitutional statute. The case of Hoover v. McChesney has been urged with

confidence by counsel in support of his conten-
46 tion. An examination of the Hoover case will disclose the fact that the Postmaster General had refused the mails of the United States to an institution which he had decided, under the authority of an Act of Congress, was engaged in an unlawful business. On the hearing it was decided by Judge Barr, of the Kentucky District, that the Act of Congress which conferred the right of seizure on the Postmaster General was unconstitutional, and that, therefore, an injunction would lie to restrain him from withholding complainant's mail, or a mandamus to compel him to deliver it.

Another case urged with great force is that of Smith v. Jackson, 241 Fed. 769. In this case the auditor of the Canal Zone, a ministerial officer, withheld from the district judge what he conceived to be a reasonable sum for rent, and such additional sum as would represent the proportionate part of his salary for such period as he was absent from the Canal Zone in excess of the time allowed by the act creating his office. The Court held that inasmuch as an annual salary had been fixed by Congress, and an appropriation had been made for a sum sufficient to pay it; and that inasmuch, further, as there was at the time no order requiring employes to pay rent, that the auditor had no discretion but to pay the salary fixed by law. In its essential features it has no bearing upon the present case.

The argument of counsel that the District Courts of the United States have concurrent jurisdiction with the Court of Claims in this character of suits under the act of 1887 is not available in this action, for the reason that the complaint contains none of the allegations of fact required by that act, and for the further reason that process has not been had as that act requires, that the United States is not made a party, but more especially because there is a subsequent act of Congress

which probably excepts this class of cases from the operation of that law.

A careful examination of the whole case has convinced the Court that Congress not only conferred, but intended to confer, upon the President an unrestricted power of supervision, involving judgment, decision and discrimination, with respect to the entire canal project, and that the Courts can exercise no direction thereover; that the complainants do not possess and never acquired a property interest in the privilegegs which they have hitherto received, and which are the subject of this proceeding, that will sustain the Court in granting the relief sought, it being the opinion of the Court that these privileges and benefits are revocable at the will of the President; and, lastly, it being alleged that these privileges result to them through a contractual
47 relation which exists between them and the United States, through the President, either the President, or the United States, or both, are the real parties in interest, and that being true this Court has no jurisdiction to determine the rights of the parties.

The opinion here submitted has taken a somewhat wider range than the motion filed by the respondents might warrant or require. The scope of the argument indulged by counsel, it may be urged in extenuation, has invited a rather full consideration of the whole case. And, in response to some of the arguments adduced the Court may be pardoned if it indulges the suggestion that Courts stray afield of their province if they discuss the wisdom or the policy of a law. Arguments bearing upon this feature of a statute address themselves to the lawmaking rather than the law-enforcing branch of government. A Court that yields to inclination ceases to be a Court. A law may be burdensome, it may

be unpopular, it may offend public sentiment, but if it be valid the Courts are powerless to grant relief against its operation. In this, as in all similar situations, the relief desired should be sought at the source of the stream.

In dismissing the present action the Court is not unmindful of the rule that Courts should assume rather than decline jurisdiction, for the reason that every citizen who feels aggrieved should have a Court in which his cause may be heard, but at the same time there is an equally potent rule which impresses upon the Courts the necessity for following established precedents, for otherwise there would be no settled rule or procedure in any given case, and order, in the end, would be forced to yield to confusion.

Let the motion to dismiss be sustained.

(Sgd.) CHARLES KERR,
United States District Judge.

Ancon, Canal Zone, January 5, 1922.

Filed Jan. 5, 1922. in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

48 FINAL DECREE DISMISSING PLAINTIFF'S SUIT.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, The Division of Balboa.

Harvey McConaughey,
Plaintiff,

vs. No. 540, Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendant.

And now the Court having filed its opinion and made its order herein, sustaining Defendants' Motion to Dismiss, it is therefore,

Ordered, adjudged and decreed,

That this cause be and the same is hereby dismissed, without costs.

Given in open Court, at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
United States District Judge.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

49 BILL OF EXCEPTIONS.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,

Plaintiff,

vs. No. 340, Civil.

J. J. Morrow, Governor of the Panama Canal, et als., Defendants.

Be it remembered, that this cause coming on to be heard upon the verified Complaint of the Plaintiff, and the Motion to Dismiss, filed on behalf of the Defendants, in our District Court, on date of December 28, 1921, and argument of counsel thereon being heard, and the Court having taken the matter under advisement, and thereafter, to-wit, upon the 5th day of January, 1921, the Court having filed its opinion and announced its decision sustaining the said motion to dismiss, Plaintiff, by Mr. Wm. C. MacIntyre, his attorney, announced that he objected to said decision and ruling and prayed that he be allowed to note and reserve his exceptions thereto upon the following grounds:

1. That the granting of said motion deprives the plaintiff of due process of law guaranteed unto him by the Constitution of the United States and the laws of the Canal Zone.

2. That the granting of said motion allows defendants to deprive plaintiff of his property without due process of law.

3. That the granting of said motion is and works a denial of justice unto the Plaintiff, and is a denial of his day in Court.

4. That the granting of said motion is contrary to law as expressed in the decision of the Circuit Court of Appeals in the case of Smith v. Jackson, 241 Fed., 757, affirmed by the U. S. Supreme Court in 246 U. S. 388.

5. That the granting of said motion allows defendants to unlawfully withhold from plaintiff, and from those in whose behalf he sues, the sum of about $50,000.00 per month, beginning with January 1st, 1922, which money has been earned by plaintiff and his co-plaintiffs as salary, fixed by authority of Congress for services performed for the United States, and which money has been appropriated by Congress for the payment of said salaries, and is now available unto defendants for such purpose and for such purposes only.

50 6. That the granting of said motion allows defendants to raise revenue for the United States, in violation of the provisions of the Constitution of the United States, and otherwise than by a bill originating in the House of Representatievs.

7. That the granting of said motion allows defendants to unlawfully divert government property from the purpose for which it was constructed and paid for by public funds of the United States.

8. That the granting of said motion allows defendants to impose upon and collect from plaintiff, and his co-plaintiffs, a direct tax, not uniform throughout the States of the Union, for the purpose of providing funds for public works of the United States.

9. That the granting of said motion allows defendants to make effective and enforce certain order of the president, made in excess of his authority, and without any authority of law, and contrary to Executive Orders made by his predecessor in office, and contrary to the provisions of an Act of Congress known as the Panama Canal Act, to the great and irreparable injury of plaintiff and of those in whose behalf he sues.

Whereupon the Court allowed unto plaintiff all of the said exceptions.

And thereafter, on the said 5th day of January, 1922, the Court entered herein its final order, decree and judgment, dismissing the bill of complaint of plaintiff and giving judgment for the defendant herein.

Whereupon, plaintiff, by his said attorney, stated that he objected to the entry of said order, decree and final judgment, and prayed that he be allowed to note and reserve thereto the same exceptions as already reserved to the ruling upon the motion to dismiss; and said exception were duly allowed by the Court.

And as all of said matters and things do not appear fully of record herein, plaintiff respectfuly tenders to the Court this bill of exceptions, and prays that the same may be approved and allowed by the Court and made a part of the Record in this cause.

(Sgd.) WM. C. MacINTYRE,
Attorney for plaintiff.

The foregoing bill of exceptions is hereby approved, and ordered filed and made a part of the record herein, the parties hereto, by their respective attorneys, agreeing.

Ancon, C. Z., Jan. 5, 1922.

(Sgd.) CHARLES KERR,
U. S. District Judge.

51 (Indorsement): Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

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52 PETITION FOR APPEAL.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Division.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als., Defendants.

To the Honorable Charles Kerr, United States District Judge for the Canal Zone:

The petition of Harvey McConaughey, plaintiff herein, made for himself and in behalf of all of those in whose behalf he brought his suit, as is set forth in his complaint, respectfully showeth unto Your Honor:

That on the 24th day of December, 1921, plaintiff filed his bill of complaint herein, for the causes in said bill of complaint set forth and verified, and thereafter

process, in form of an order to show cause, issued to said defendants, and thereafter, to-wit, on the 28th day of December, 1921, defendant filed herein their motion to dismiss, which motion was made and heard by Your Honor upon the grounds in said motion set forth and expressed. And thereafter, to-wit, on the 5th day of January, 1922, over the objection of plaintiff, Your Honor made and entered an order sustaining and granting defendants' said motion, to which said order your Honor allowed plaintiff to note and reserve his exceptions, which was duly done. And thereafter Your Honor made and caused to be entered final judgment herein, dismissing plaintiff's said bill of complaint; to which said judgment plaintiff likewise noted and reserved his exceptions by Your Honor's allowance.

Your Petitioner believes that the said orders and judgment of the Court were erroneous, and that injustice would be done if the same should be allowed to stand and be carried into effect.

Wherefore your petitioner respectfully prays for leave to appeal from said orders and judgment unto the United States Circuit Court of Appeals for the Fifth Circuit.

WM. C. MacINTYRE,
Attorney for plaintiff.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

53 AFFIDAVIT ON APPEAL.

United States of America,
Canal Zone, SS.
Ancon.

William C. MacIntyre, of lawful age, being first duly sworn, acocrding to law, on oath deposes and says:

That he is the Attorney for the Plaintiff herein; that the appeal from the final order and decree of the United States District Court for the Canal Zone in the above-entitled cause, was not taken for delay, but because the deponent believes that injustice would be done by the said final judgment or decree if carried into effect and allowed to become final, and deponent further says that the amount herein involved is in excess of $1000,00, exclusive of interest and costs.

WM. C. MacINTYRE,
Attorney for Plaintiff.

Subscribed and sworn to before me at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) E. M. GOOLSBY,
(Seal of Court) Clerk of the Court.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

54 ASSIGNMENTS OF ERROR.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Balboa Division.

Harvey McConaughey, etc.,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

The assignments of error of the plaintiffs herein, against the said defendants, respectfully show unto this Honorable Court as follows:

First Assignment of Error.

That the Court erred in holding that the present suit is, in effect, a suit against the President, or against the United States, and that therefore the Court is without jurisdiction to entertain this suit.

Second Assignment of Error.

That the Court erred in holding that the Court is without jurisdiction over the defendants herein.

Third Asignment of Error.

That the Court erred in holding that plaintiff and his co-plaintiffs have no property interest in the privileges granted by the terms and conditions of their employment.

Fourth Assignment of Error.

That the Court erred in holding that the plaintiff and his co-plaintiffs have no property interest in the salaries and wages earned by them and threatened to be withheld from them by the defendants.

Fifth Assignment of Error.

That the Court erred in holding that employees of the Panama Canal and of the Panama Railroad have no property interest or vested right in the occupancy and use of the quarters which have been assigned to them free of cost during the term of their employment according to regulations of the Isthmian Canal Commission, ratified by the Act of Congress known as the Panama Canal Act of August 24, 1912, and continued by express provision of Executive Order of President Wilson of July 25, 1916.

Sixth Assignment of Error.

That the Court erred in holding and ruling that the regulations adopted by the Isthmian Canal
55 Commission at its 120th meeting, and promulgated by order of the President concerning conditions of employment for the construction of the Panama Canal, were not continued in force as valid and binding by provision of the Panama Canal Act of August 24, 1912.

Seventh Assignment of Error.

That the Court erred in holding and ruling that the President may by executive order subsequent to the enactment of the Panama Canal Act of August 24, 1912

change, annul, repeal, or modify the regulations adopted by the Isthmian Canal Commission and promulgated by order of the President, regulating and fixing the conditions of employment for the construction of the Panama Canal.

Eighth Assignment of Error.

That the Court erred in holding and ruling that: "For a period of almost eight years there has been an outstanding notice from the President that their existed the right to withdraw these privileges, and that no vested or contract rights had been or could be acquired therein," and in failing to find, hold and rule that the Executive Order of January 15, 1915, was expressly rescinded and abrogated by subsequent Executive Order of July 25, 1916, and that by said latter Executive Order all of said privileges were expressly given to employes as a condition of their employment.

Ninth Assignment of Error.

The Court erred in failing to hold and rule that an Executive Order lawfully made by President Wilson creating and establishing contractual rights for the plaintiff and his co-plaintiffs cannot be lawfully revised or abrogated by his successor in office, and that rights thereunder obtained and entered into cannot be taken away without due process of law.

Tenth Assignment of Error.

The Court erred in holding and ruling that the Executive Order of December 3, 1921, was made by the President under authority of the Panama Canal Act of August 24, 1912.

Eleventh Assignment of Error.

The Court erred in holding that the action of the President in making Executive Order of December 3, 1921, providing for charges against plaintiff and his co-plaintiffs for the purpose of raising revenue for public works of the United States is constitutional and made under authority of law.

56 Twelfth Assignment of Error.

The Court erred in holding and ruling that: "Congress not only conferred but intended to confer, upon the President an unrestricted power of supervision, involving judgment, decision and discrimination, with respect to the entire canal project, and that the Courts can exercise no direction thereover."

Thirteenth Assignment of Error.

The Court erred in failing to hold and to rule that the Court has jurisdiction to enjoin the defendants herein from causing a breach of contract made between plaintiff and his co-plaintiffs and the United States.

Fourteenth Assignment of Error.

The Court erred in dismissing plaintiff's complaint upon the grounds and for the reasons set forth in the Opinion of the Court herein filed of record.

(Sgd.) WILLIAM C. MacINTYRE,
Attorney for Plaintiff.

(Indorsement): Filed January 5, 1922 in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

57 ORDER ALLOWING APPEAL.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

And now the Plaintiff herein having prayed for leave to appeal from the final judgment herein rendered and entered, unto the United States Circuit Court of Appeals for the Fifth Circuit, and having filed herein his Assignments of Error, and Defendants, by their Attorney, A. C. Hindman, in open Court having waived any further notice of said petition for Appeal, and this Court being willing that error, if any has been made, may be corrected and that justice be done, it is therefore,

Ordered,

That plaintiff may be allowed, and he is hereby allowed his appeal from the final order and decree of this Court in this cause heretofore made, unto the Honorable The United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, La., U. S. A.

Done in open Court, at Ancon, C. Z., this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
U. S. District Judge.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

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58 PETITION FOR WRIT OF ERROR.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als., etc.,
Defendants.

Comes now the above-named Plaintiff, by William C. MacIntyre, his attorney, for himself, and for all of those in whose behalf he sues, and feeling himself and themselves aggrieved by the judgment of this Court in the above-entitled cause made and entered, whereby judgment was rendered for the Defendants, and against the Plaintiff, dismissing Plaintiff's complaint and action herein, and he hereby moves and petitions this Honorable Court for an order to be made, allowing the said Plaintiff to prosecute a writ of error from the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to this Honorable Court, for the reasons specified in the Assignment of Errors already filed herein; and that this Petition being allowed, a Transcript of the Record in this cause, and of all the proceedings upon which judgment was rendered, duly authenticated and certified, may be made and sent to

the said United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La., U. S. A.

WM. C. MacINTYRE,
Attorney for Plaintiff.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

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59 ORDER ALLOWING WRIT OF ERROR.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als.,
Defendants.

And now upon reading the petition for Writ of Error herein filed by the Plaintiff, and upon motion of Mr. William C. MacIntyre, attorney for Plaintiff, it is

Ordered,

That a Writ of Error be and the same is hereby allowed to issue, to have reviewed by the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, the final judgment herein made and entered; and it is further ordered that the bond upon said writ of error be in the sum of Five Hundred dollars, ($500,00), and said Plaintiff having been also herein allowed an Ap-

peal from said judgment, it is further ordered that said bond shall be and serve for both said Appeal and the said Writ of Error.

Be it further ordered that Citation issue unto the Defendants herein.

(Sgd.) CHARLES KERR,
U. S. District Judge.

Given in open Court, at Ancon, C. Z., this 5th day of January, 1922.

Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone, (Sgd.) E. M. Goolsby, Clerk.

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60 CITATION IN ERROR, AND ON APPEAL.

United States of America, Canal Zone.

In the United States District Court for the Canal Zone, Division of Balboa.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow, Governor of the Panama Canal, et als., etc.,
Defendants.

To J. J. Morrow, Governor of the Panam Canal; H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, Greeting: You are hereby cited and admonished to be and ap-

pear in the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, U. S. A., thirty days from and after the day this citation bears date, pursuant to a Writ of Error and Appeal filed in the Clerk's Office of this Court, wherein Harvey McConaughey is plaintiff in error and appellant, and J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, are defendants in error and appellees, to show cause, if any there be, why the judgment rendered against the Plaintiff, in said Writ of Error and appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable Charles Kerr, United States District Judge for the Canal Zone, hereunto set this 5th day of January, 1922.

(Sgd.) CHARLES KERR,
U. S. District Judge.

Attest:

(Sgd.) E. M. GOOLSBY,
Clerk of the Court.

Service of this Citation is hereby acknowledged, at Ancon, Canal Zone, this 5th day of January, 1922.

(Sgd.) A. C. HINDMAN,
Attorney for Defendants.

61 (Indorsement): Filed Jan. 5, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

62 BOND ON APPEAL AND WRIT OF ERROR.

United States of America, Canal Zone.

In the United States District Court, in and for the Canal Zone, Balboa Division.

Harvey McConaughey,
Plaintiff,
vs. No. 540 Civil.

J. J. Morrow Governor of the Panama Canal, et als., Defendants.

Know all men by these presents, that we, Harvey McConaughey, as principal, and Joseph Wynne, W. C. Hushing, and E. L. Emrey all of Balboa, Canal Zone, as sureties, are and hereby recognize ourselves to be well and firmly unto the defendants here in the penal sum of Five Hundred Dollars ($500.00) for the faithful payment whereof, according to the terms and tenor of this obligation we hereby pledge ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated at Ancon, Canal Zone, this 5th day of January, 1922.

Now the terms and conditions of this obligation are as follows:

Whereas, on the 5th day of the January term of the District Court for the Canal Zone in the present year in a suit pending in said Court between Harvey McConaughey, plaintiff, and J. J. Morrow, Governor of the

Panama Canal, H. A. A. Smith, and R. W. Glaw, Auditor and paymaster, respectively, of the Panama Canal, defendants, a judgment was rendered against the said Harvey McConaughey, and the said Harvey McConaughey has prayed for and obtained an appeal and a writ of error to review said judgment in the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, and a citation directed to the said defendants citing and admonishing them to be and appear in the said U. S. Circuit Court of Appeals at New Orleans, La., thirty days from and after the date of said citation (which will be February 4, 1922) which citation has been duly served and acknowledged by attorney for defendants.

Now therefore, if the said Harvey McConaughey shall appear in the said United States Circuit Court of Appeals at the time specified in said citation, and shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded
63 against him, if he fail to make his plea good, then, and in such case this obligation shall be wholly discharged and void; otherwise to remain in full force and effect for the payment of all such damages and costs.

(Sgd.) HARVEY McCONAUGHEY,
Principal.
J. WYNNE,
W. C. HUSHING,
E. L. EMREY,
Sureties.

The foregoing bond and the sureties thereupon are hereby approved by the undersigned United States District Judge, and said bond is ordered filed in this cause.

Given in Chambers, at Ancon, Canal Zone, this 6th day of January, A. D. 1922.

(Sgd.) CHARLES KERR,
United States District Judge.

Attest:

(Sgd.) E. M. GOOLSBY,
Clerk of the Court.

Filed January 6, 1922, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

64 United States of America,
Canal Zone. SS.

I, E. M. GOOLSBY, Clerk of the District Court of the Canal Zone, do hereby certify that the foregoing 63 pages contain a true and correct copy of the proceedings and orders authorizing the prosecution of an appeal and writ of error to the United States Circuit Court of Appeals for the Fifth Circuit in the above styled cause; and I further certify that the foregoing 63 pages contain a true and complete transcript of all the material proceedings had upon the trial of the said cause in the District Court of the Canal Zone up the granting of the appeal and the suing out of the writ of error.

In witnes whereof, I have hereunto set my hand and seal of this Court on this 6th day of January, A. D. 1922.

E. M. GOOLSBY,
(Seal) Clerk of Court.

Order Requiring Appellees to Hold Moneys Collected and Not to Deposit Same in the Treasury of the United States Pending Appeal, etc.

Filed January 31st, 1922.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal et al., Appellees and Defendants in Error.

Appeal from and Error to the United States District Court for the Canal Zone.

In the above case, it being represented to the Court that there is danger of irreparable injury occurring to the plaintiffs in error-appellants pending the hearing of said appeal unless a temporary restraining order is granted preventing the payment of the moneys to be collected from said appellants and plaintiffs pending said appeal into the Treasury of the United States;

It is, upon consideration, ordered that the defendants in said case be required to hold said moneys collected pending said appeal, including those now in their hands, and not to pay the same into the Treasury of the United States, that they may continue to collect or withhold said moneys pending the hearing and decision of said case, the purpose of this order being to preserve the status quo.

It is further ordered that the said defendant shall have the right to apply at any time for modification or revocation of this order upon giving such notice to the appellants and plaintiffs in error as may be prescribed by this Court on the application for such hearing.

Jan. 31, 1922.

(Signed) R. W. WALKER,
United States Circuit Judge.

(Signed) N. P. BRYAN,
United States Circuit Judge.

(Signed) ALEX C. KING,
United States Circuit Judge.

Clerk's Office.

Attest:
A True Copy:
(Signed) FRANK H. MORTIMER,
[SEAL.] *Clerk U. S. Circuit Court of Appeals, Fifth Circuit.*

New Orleans, La., January 31st, 1922.

Return of Service.

Served the foregoing order on Colonel Meriwether L. Walker, Acting Governor of The Panama Canal, H. A. A. Smith, Auditor of The Panama Canal, and R. W. Glaw, Paymaster of The Panama Canal, by delivering to each a true copy of same, at Balboa Heights, Canal Zone, February 7th, 1922. (The Marshal's fee amounting to $3.60 has been collected.)

HORACE D. RIDENOUR,
U. S. Marshal for the Canal Zone,
(Signed) By FRANK T. HAMLIN,
Deputy.

Motion of Appellees to Dismiss and Acceptance of Service.

Filed March 8th, 1922.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and in Behalf of All Other Employees of the Panama Canal and the Panama Railroad, on the Isthmus of Panama, Appellant (Plaintiff in Error),

vs.

J. J. MORROW, Governor of the Panama Canal; H. A. A. SMITH, Auditor of the Panama Canal; R. W. Glaw, Paymaster of the Panama Canal, and the Successors in Office of All the said Parties, Appellees (Defendants in Error).

And now come the defendants in error and appellees and move the court to dismiss the writ of error and appeal herein for the following reasons, to-wit:

I.

That it appears from the record in the above-entitled cause that this appeal and writ of error are prosecuted solely from the decision of the District Court of the Canal Zone denying jurisdiction in the above-entitled cause, and that no other question but that of jurisdiction was presented to the lower court.

II.

That Section 128 of the Judicial Code of the United States, 36 Stat. L., 1133, as amended by 38 Stat. L. 803, gives no appellate jurisdiction to the United States Circuit Courts of Appeals in matters where the jurisdiction of the lower court alone is involved.

III.

That Section 9 of the Panama Canal Act, approved August 24, 1912, (37 Stat. L., 560569), providing for appeals from the District Court of the Canal Zone to the United States Circuit Court of Appeals of the Fifth Circuit, makes no provision for appeals in actions in which the jurisdiction of the District Court of the Canal Zone is involved and an appeal prosecuted on that question alone.

IV.

That Section 238 of the Judicial Code of the United States, 36 Stat. L., 1157, as amended by 38 Stat. L., 804, provides that appeals from the District Courts of the United States in cases in which the jurisdiction of the lower court is in issue shall be taken direct to the Supreme Court of the United States.

(Signed) A. HINDMAN,
Counsel for Defendants in Error and Appellees.

Service of the foregoing Motion to Dismiss and receipt of a copy thereof acknowledged this 8 day of March, 1922.

(Signed) WM. C. MACINTYRE,
Counsel for Appellant and Plaintiff in Error.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of April 4th, 1922.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others,

versus

J. J. MORROW, Governor of the Panama Canal, et al.

On this day this cause was called, and after argument by William H. Jackson, Esq., and William C. MacIntyre, Esq., for plaintiff in error and appellant, and A. C. Hindman, Esq., United States District Attorney, for defendants in error and appellees, was submitted to the Court.

Opinion of the Court.

Filed April 11th, 1922.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal, et als., Appellees and Defendants in Error.

Appeal from and Error to the United States District Court for the Canal Zone.

William C. MacIntyre and William H. Jackson for Appellant and Plaintiff in Error.
A. C. Hindman for Appellees and Defendants in Error.

Before Walker, Bryan, and King, Circuit Judges.

WALKER, *Circuit Judge:*

The appellant and plaintiff in error, (who will be referred to as the plaintiff), brought this suit on December 24, 1921, against the appellees and defendants in error, who, respectively, are the Governor, Auditor, and Paymaster of the Panama Canal, and will be referred to as the defendants. The plaintiff's bill or petition alleged that he is an employee of the United States upon the Isthmus of Panama, in the service of the Panama Canal, is domiciled in the town of Balboa in the Canal Zone, and at the time of and prior to the bringing of the suit was occupying and using a dwelling with furniture and appurtenances, belonging to the United States, which was assigned to him for free use and enjoyment during the time of his stated employment. That pleading contains the following:

"And plaintiff brings this suit for himself and in behalf of all other citizens of the United States of America who are employees of the United States in the service of the Panama Canal and of the Panama Railroad, within the Canal Zone and upon the Isthmus of Panama. And the rights, interest, claims, grievances and demands of all other employees of the United States in the service of The Panama Canal and of the Panama Railroad, upon the Isthmus of Panama, as against the defendants herein, are identical with those of plaintiff, and the relief herein demanded affects all such parties equally with plaintiff, and all of such persons are interested parties in the final outcome of this suit; but the plaintiff says, and shows unto the Court, that all of such persons interested herein, as afore-

said, number about three thousand, (3,000), more or less, and reside at different parts of the Canal Zone, and of the Isthmus of Panama, and that it is impracticable to join all of such parties as parties plaintiff hereto."

The relief prayed was an injunction restraining the defendants from putting into effect an executive order made by the President on December 3, 1921, providing for a charge being made for rent, fuel, electric current, water, and services in connection with Government owned quarters, on and after January 1, 1922. On the day the bill was filed an order was made requiring the defendants, at a time and place named, to show cause why the preliminary injunction prayed for should not be granted. The defendants filed a paper which, after stating that the defendants appeared specially for the purposes of the motion only, contained a motion to quash the order to show cause and to dismiss the bill of complaint for the following reasons:

"1. That this Court is without jurisdiction of the subject matter of the said bill, in that it is a suit to enjoin the collection of funds for and on behalf of the United States and for deposit in the Treasury of the United States, and is, therefore, in effect a suit against the United States.

2. That this Court is without jurisdiction of the subject matter of the said bill and of the persons of these defendants, for the reason that it appears from said bill that said defendants are officials of the Executive Branch of the Government of the United States, and in the matters complained of in said bill are acting in their respective official capacities by and under the direction of the President of the United States. That this Court has no jurisdiction to enjoin the President of the United States, or any other person carrying out his orders in their official capacities.

3. That the Executive Branch of the United States Government and the Judicial Branch of the United States Government are co-ordinate branches, and there is no jurisdiction in this Court to enjoin a co-ordinate branch of the United States Government in the exercise of its executive discretion."

The Court sustained that motion, and dismissed the bill. The plaintiff sued out both an appeal and a writ of error.

In this court the defendants moved to dismiss the appeal and writ of error on the ground that no question other than that of jurisdiction was presented in the court below, and that this court is without power to review the decree dismissing the bill on the above set out grounds. We do not think that the motion in pursuance of which the bill was dismissed raised a question as to the jurisdiction of the trial court within the meaning of Federal statutes providing for appellate review in cases in which the jurisdiction of a court of the United States is in issue. The propriety of granting the relief sought was brought into question on principles which are applicable where the court has jurisdiction of the parties and the subject matter. The motion invoked the decision of the court on the as-

serted right of the plaintiff to have the relief sought. It did not raise a question as to the power or jurisdiction of the court to rule on that question. Fore River Shipbuilding Co. v. Hogg, 219 U. S. 175. Furthermore, the case is one within the appellate jurisdiction conferred on this court by a provision contained in Section 9 of the Panama Canal Act, 37 Stat. 565. By that provision this court is given "jurisdiction to review * * * final judgments and decrees of the District Court of the Canal Zone * * * in all actions and proceedings in which the Constitution, or any statute * * * of the United States is involved and a right thereunder denied," etc. The bill in this case asserted the claim that the plaintiff, as an employee of the United States in the Canal Zone, was entitled to free quarters under orders or regulations which were in force at the time of the enactment of the Panama Canal Act, and that those orders or regulations were within the terms of the following provision of Section 2 of that Act:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

The claim asserted by the suit is that the just quoted provision of the statute had the effect of continuing in force until Congress shall otherwise provide, the above mentioned orders or regulations as to providing employees with quarters and that the President is without power to require the payment of rent by employees occupying Government owned quarters in the Canal Zone. The suit is one involving a statute of the United States, and the effect of the dismissal of the bill was a denial of a right asserted under that statute. The conclusion is that the case is one within the appellate jurisdiction conferred on this court by the above quoted provision. That provision alone, and not any provision or provisions of the Judicial Code, is to be looked to when the question is as to the right of this court to review a final judgment or decree of the District Court of the Canal Zone. That provision contains no exception having the effect of depriving this court of jurisdiction to review a final judgment in a case within any of the enumerated classes by reason of the jurisdiction of the District Court of the Canal Zone being brought into question in such case.

The acquisition of the Canal Zone by the United States was followed by the construction, with money appropriated by Congress, of dwelling houses for the use of employees of the United States engaged in the service of the Isthmian Canal Commission, the Panama Canal and the Panama Railroad. While the Isthmian Canal Commission was in existence it pursued the policy of allowing Government employees to use, free of rent, Government owned dwellings and quarters. This policy was evidenced by orders or regulations adopted and promulgated from time to time by the Isthmian Canal Commission. On February 13, 1907, it adopted the following regulation, to be effective April 1, 1907: "Whenever practicable and in the best

interest of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time." We understand that the just quoted regulation is the one on the subject which was in force at the date of the enactment of the Panama Canal Act on August 24, 1912. In behalf of the plaintiff it is contended that the above quoted provision of section 2 of that Act had the effect of keeping the just quoted regulation in force "until Congress shall otherwise provide." If that position is a tenable one it does not follow that the plaintiff has an enforceable right to continue to occupy, free of rent, the Government property which was assigned for his use. The language of that regulation negatives the conclusion that thereby the employer relinquished or abridged its right to determine, in the case of any employee, whether it is or is not practicable and in the best interests of the service to provide such employee with quarters on the Isthmus. The matter remained one as to which the employer had and retained a right to exercise its unregulated and unqualified judgment or discretion. The terms of the regulation make the continuance of the privilege or benefit in question dependent upon the authorized representative or representatives of the employer continuing to be of opinion that it is in the best interests of the service not to change the policy or practice. An employee has no legally enforceable right to what the employer has the option to grant or withhold as the latter's judgment or discretion may dictate. The continuance of the arrangement practically was no more assured than it would have been if a tenancy at the will of the employer had been created. The existence of the regulation and what was done under it brought about a situation like that resulting from a contract which is so uncertain and contingent in its terms as to be legally unenforceable. Brown v. Camp, 275 Fed. 612; Wald's Pollock on Contracts, (3rd Ed.), 48, 49.

The above quoted provision of section 2 of the Panama Canal Act does not purport to continue in force anything other than "laws, orders, regulations and ordinances adopted and promulgated * * * for the government and sanitation of the Canal Zone and the construction of the Panama Canal." The just quoted language does not indicate an intention to embrace the matter of the terms of employment and the housing of Government employees rendering services in the Canal Zone. The sole plaintiff in this case bases the right asserted by the suit on the fact that he is an employee of the United States upon the Isthmus of Panama in the service of the Panama Canal. It is not shown that the services the plaintiff was employed to render have any connection with the government and sanitation of the Canal Zone or the construction of the Panama Canal. No other person has made himself a party plaintiff. See Bruce v. Manchester & Keene Railroad, 117 U. S. 514.

Section 4 of the Panama Canal Act contains the following:

"When, in the judgment of the President, the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary, the President is authorized, by executive order, to discontinue the Isthmian Canal Commission, which, together with the

present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a Governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone."

Section 7 of that Act defines the duties of the Governor, and requires him to perform the executive and administrative duties required by existing law. In 1914 the President, under the authority conferred by Section 7 of the Panama Canal Act, abolished the Isthmian Canal Commission, and assumed the duties and powers conferred on him in the situation so brought about. The above quoted language of section 4 evidences an intention to vest in the President power to determine such matters as terms and conditions of employment and the regulation of the use of Government property by Government employees in the Canal Zone, in respects not governed by existing law. We are not advised of any law having the effect of depriving the President of the power to require payment of rent for the use of Government owned residence property in the Canal Zone, or of conferring on an employee situated as the plaintiff is the right to continue to use such property free of rent. On January 15, 1915, the President made an executive order which contained the following:

"The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of employes, but revocable privileges, which it has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the basis for increasing salaries or wages or otherwise increasing compensation."

The continuance thereafter of the practice of allowing employees to use Government owned dwellings or quarters free of rent was with full notice that the privilege was subject to revocation, and would be revoked at a time deemed appropriate. We do not think that the President did what he was without power to do in discontinuing the privilege or benefit in question in the manner adopted.

For reasons above indicated we conclude that the plaintiff is not entitled to have the defendants enjoined from putting into effect the above mentioned executive order made by the President on December 3, 1921, and that the court did not err in dismissing the bill. The decree to that effect is affirmed.

(Original Filed April 11th, 1922.)

Judgment.

Extract from the Minutes of April 11th, 1922.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others,

versus

J. J. MORROW, Governor of the Panama Canal, et als.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Canal Zone, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed.

Petition for Appeal and Order Allowing Same.

Filed April 15th, 1922.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant,

v.

J. J. MORROW, Governor of the Panama Canal, et als., Appellees.

Petition for Appeal.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The Petition of Harvey McConaughey, Appellant herein, made for himself and in behalf of all of those in whose behalf he brought his suit, as is set forth in his original complaint in this cause filed, respectfully showeth unto Your Honors:

That on the thirty-first day of January, 1922, Appellant filed in this Court his Appeal and Writ of Error, duly accompanied by his Assignments of Error, wherein he appealed to this Honorable Court from a final judgment and decree made and entered by the Honorable Charles Kerr, United States District Judge for the Canal Zone, in the District Court for the Canal Zone, the Fifth day of January, 1922. And all proper proceedings therein having been had, thereafter, to wit, upon the 4th day of April, 1922, said Appeal was duly heard by this Honorable Court and submitted to this Honorable Court upon briefs and arguments of the respective parties hereto.

And thereafter, to wit, upon the 11th day of April, 1922, this Honorable Court made and entered its judgment, order and decree, affirming the judgment and decree of the Honorable the District Court for the Canal Zone, and denying unto Your Petitioner the relief sought by him in his said Appeal.

Your Petitioner believes that said judgment, order and decree of this Honorable Court were erroneous, and that injustice would be done if the same should be allowed to stand and be carried into effect.

Wherefore, by virtue of the right reserved unto him by the provisions of the Act of Congress of August 24, 1912, known as the Panama Canal Act, Your Petitioner respectfully prays for leave to appeal from said judgment, order and decree of this Honorable Court, unto the Supreme Court of the United States.

(Signed) WM. C. MACINTYRE,
Solicitor for Appellant.

Order.

Let the appeal herein prayed for be allowed upon the making and filing by the Appellant of a good and proper bond in the sum of $1,000. Given in chambers, at New Orleans, La., this 15th day of April, 1922.

(Signed) N. P. BRYAN,
U. S. Circuit Judge.

Assignments of Error.

Filed April 15th, 1922.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, for Himself and Others, Appellant and Plaintiff in Error,

versus

J. J. MORROW, Governor of the Panama Canal, et als., Appellees and Defendants in Error.

Assignments of Error.

Comes now the appellant in the above entitled cause and files the following assignments, upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 11th day of April, 1922.

I.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding and ruling that the President of the United

States has the power and authority, under the act of Congress of August 24, 1912, known as the Panama Canal Act, to promulgate for the Canal Zone his Executive Order of December 3, 1921.

II.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the Executive Order of January 15, 1915, constituted legal notice to appellant and to all other employees of the United States in the service of the Panama Canal and the Panama Railroad upon the Isthmus of Panama, or that said Executive Order was or is legal notice that the practice of giving to appellant and to said employees the use of government owned quarters upon the Canal Zone, free of rent, might be or would be discontinued at the pleasure of the President.

III.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to notice and to give legal effect to the Executive Order of July 25, 1916, which said Executive Order annuls, cancels and repeals the Executive Order of January 15, 1915, and abrogates all rules made thereunder, and which said Executive Order of July 25, 1916, legally made and promulgated by the President of the United States, by authority of the Panama Canal Act, guarantees the use of government owned quarters upon the Isthmus of Panama, free of rent to appellant and to all employees of the United States in the service of the Panama Canal upon the Canal Zone, during the term of their employment.

IV.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding and ruling that the President of the United States has the power and authority to dispose of the property of the United States on the Canal Zone, by rent or otherwise, without the specific sanction of Congress.

V.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold and to find that the arbitrary collection of monies from appellant and those in whose behalf he sues in the manner as set forth in the original complaint filed herein constitutes an illegal texation of appellant and those in whose behalf he sues, contrary to the provisions of Paragraph 4, Section 9 of Article 1 of the Constitution, and of Paragraph 1, Section 7 of Article 1 of the Constitution, and Section 8 of Article 1 of the Constitution.

VI.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold and decree that injunction should lie

against the appellees herein to prevent the illegal withholding from appellant and those in whose behalf he sues of wages by them earned, the monies for which have been duly appropriated by Congress and are in the hands of appellees for the payment of such wages.

VII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to notice and give effect to the opinions of attorneys-general defining the power of the President to legislate or make rules for the Canal Zone under the restrictions and limitations of the Panama Canal Act of August 24, 1912.

VIII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold that Congress has the exclusive power to change laws and regulations of the Canal Zone, and to make rules for the disposition of the property of the United States upon the Canal Zone.

IX.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in failing to hold that appellant and those in whose behalf he sues are occupying their quarters upon the Canal Zone under contract with the United States to hold such quarters free of rent during the period of their employment in the service of the Panama Canal and of the Panama Railroad on the Canal Zone.

X.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the appellant and those in whose behalf he sues have no vested rights in the occupation of the government owned quarters upon the Canal Zone, under the terms of their employment.

XI.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding, under authority of the case of Bruce vs. Manchester & King Railroad, 117 U. S., 514, that the appellant, Harvey McConaughey, is the sole plaintiff in this cause, and in failing to hold that all those in whose behalf he sues, as set forth in his complaint, are co-plaintiffs in this action.

XII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding that Section 53 of the Laws of the Canal Zone was not continued in force upon the Canal Zone by the Panama Canal Act of August 24, 1912, and in holding that the President, by Executive Order, has any power or authority to change the provisions of said Section 53 of the Laws of the Canal Zone.

XIII.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in affirming any part of the decree in this cause made by the Honorable District Court for the Canal Zone.

XIV.

That the United States Circuit Court of Appeals for the Fifth Circuit erred in not reversing the decree of January 5, 1922, made by the District Court of the Canal Zone, in this cause.

Wherefore, the appellant prays that said decree be reversed and that said United States Circuit Court of Appeals for the Fifth Circuit be ordered to enter a decree reversing the decision of the lower court in said cause.

(Signed) WM. C. MACINTYRE.
WM. H. JACKSON (W. C. M.),
Solicitors for Appellant.

Appeal Bond.

Filed April 17th, 1922.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3826.

HARVEY MCCONAUGHEY, etc., Appellant,

v.

J. J. MORROW, Governor of the Panama Canal, et als., Appellees.

Bond of Appeal.

Know all men by these presents:

That we, Harvey McConaughey, as principal and Union- Indemnity Co., as surety, are, and hereby recognize ourselves to be well and truly bound unto J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, in the penal sum of One thousand dollars ($1,000.00), for the payment whereof we hereby bind ourselves, our heirs, Executors, Administrators, and Assigne-s, according to the terms, stipulations, and agreements of this obligation, which are as follows:

Whereas Harvey McConaughey, in the above styled and numbered cause now pending in the U. S. Circuit Court of Appeals for the Fifth Circuit, has prayed, and has been allowed an appeal unto the Supreme Court of the United States, from the judgment of said Cir-

cuit Court of Appeals made and entered on the 11th day of April 1922; now, if the said Harvey McConaughey shall well and truly prosecute said appeal unto said Supreme Court, and shall well and truly pay, or cause to be paid, all costs and damages herein which may be finally adjudged against him, then, and in such event, this obligation shall be wholly discharged and void: otherwise to remain in full force and effect for the faithful payment unto the said J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal and R. W. Glaw, Paymaster of the Panama Canal of all such costs and damages, not to exceed said penal sum stipulated of One thousand dollars ($1,000.00.)

In witness whereof we, the said principal, by William C. MacIntyre, his attorney and the surety, Union Indemnity by S. S. Levy, Agent & Atty.-in-fact, have hereunto affixed our hands and seals, in the City of New Orleans, State of Louisiana, the 17th day of April, A. D. 1922.

HARVEY McCONAUGHEY,
Principal,

(Signed) By WM. C. MacINTYRE,
Attorney.

UNION INDEMNITY COMPANY,
Surety,

(Signed) By S. S. LEVY, [SEAL.]
Agent & Attorney-in-Fact.

Bond approved this April 17, 1922.
(Signed) N. P. BRYAN,
U. S. Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 93 to 114 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3826, wherein Harvey McConaughey, for Himself and Others, is appellant and plaintiff in error, and J. J. Morrow, Governor of the Panama Canal et als., are appellees and defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 92 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of May, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

THE UNITED STATES OF AMERICA:

The President of the United States to J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of the Panama Canal, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to an Appeal sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein Harvey McConaughey, for himself and others, employees of the Panama Canal and of the Panama Railroad Company, upon the Canal Zone, is the Appellant, and J. J. Morrow, Governor of the Panama Canal, H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaster of *of* the Panama Canal, are the Appellees, to show cause, if any there be, why the Judgment rendered against the said Harvey McConaughey, etc., Appellant, and in said petition and order of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this Seventeenth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

N. P. BRYAN,
United States Circuit Judge.

[Endorsed:] Original. No. 3826. United States Circuit Court of Appeals, Fifth Circuit. Harvey McConaughey, for Hi*l*self and Others, Appellant, vs. J. J. Morrow, Governor of the Panama Canal, and Others, Appellees. Citation. Filed 10th day of May 1922. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Served the within Citation by personally delivering a true copy of same to each of the following named as follows: To Col. J. J. Morrow, Governor of the Panama Canal, at Balboa Heights, Canal Zone, April 29th, 1922; to H. A. A. Smith, Auditor of the Panama Canal,

at Balboa Heights, Canal Zone, April 28th, 1922; and to R. W. Glaw, Paymaster of The Panama Canal, at Cristobal, Canal Zone, April 29th, 1922.

HORACE D. RIDENOUR,
U. S. Marshal for the Canal Zone,
By FRANK T. HAMLIN,
Deputy.

Marshal's fees:

Service	$3.00
Mileage	5.00
	$8.00

Endorsed on cover: File No. 28,933. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 393. Harvey McConaughey, for himself and others, employees of the Panama Canal and of the Panama Railroad Company, appellant, vs. J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, auditor of the Panama Canal, and R. W. Glaw, paymaster of the Panama Canal. Filed May 17th, 1922. File No. 28,933.

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Civil Service Form No. 1417, Dec. 3, 1904	5
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United States Statutes:	
35 Stat. L., 658	18
39 Stat. L., 527	13

Supreme Court of the United States.

October Term, 1923
No. 48

HARVEY McCONAUGHEY, FOR HIMSELF AND OTHERS, *Appellant.*

vs.

J. J. MORROW, GOVERNOR OF THE PANAMA CANAL, *et al., Appellees.*

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case is in this Court on appeal from an order of the Circuit Court confirming an order of the United States District Court in and for the Canal Zone, dismissing a bill brought by the appellant to restrain the appellees from deducting from the salary of the appellant and others in like situation as rent for the use of quarters owned by the United States and occupied by the appellant and also from deducting from said wages charges for electric current and water and to prevent the appellees from charging to the appellant and those in similar circumstances the cost of repairing the building and furniture and the keeping of hedges and grass in proper condition (R. pp. 3-21 inclusive).

From the Bill it appears that the appellant (plaintiff in the Trial Court), is a citizen of the United States, residing at Balboa in the Canal Zone, and employed in the service of the Panama Canal; that there are about 3,000 others in a similar condition; that the appellees are respectively: J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaste of the Panama Canal (R. pp. 3-5, inclusive).

It further appears that by various acts of Congress sums of money were appropriated for the building of said Canal, and, as an incident thereto "various quarters or dwelling houses for the housing and quartering of American employees of the United States" were erected from said moneys and that said quarters or dwelling houses are the property of the United States (R. pp. 5 and 6); that regulations were made, adopted and promulgated, providing among other things for free quarters for American employees in the service of the United States and that such quarters were provided with moneys appropriated by Congress (R. p. 6).

It further appears that such regulations were ratified and confirmed by section two of the act of Congress of August 24, 1912, "until Congress shall otherwise provide," (R. p. 7), and Congress has since failed to "otherwise provide" (R. pp. 8 and 9); that the appellant was induced to take up the said employment by an agreement made with the appellant, and others on behalf of whom he sues, to furnish "free quarters containing all necessary articles of furniture" and that the appellant and those for whom he sues have performed their portion of the contract (R. pp. 9-11).

It is further alleged that an executive order was issued on the third day of December, 1921, to the effect that a "charge will be made for rent, fuel, electric cur-

rent, water and services in connection with quarters on and after January 1, 1922," and that such executive order is beyond the authority of the president (R. pp. 11-13); that the appellees are about to carry said order into execution and will deduct from the salaries of the appellant and those similarly situated at regular intervals money with which to pay charges and will continue so to do without right or authority and appellees will "lease, rent, let-out, to persons not connected with the United States such quarters" (R. pp. 13-16); that these deductions will amount to $500,000.00 per year and that the appellants are without redress at law and pray a decree enjoining appellees "from directly or indirectly, charging, collecting, deducting, withholding, receiving any money or moneys whatsoever or any parts of wages, salary or compensation from appellant and from any other employee of the United States in the service of the Panama Canal or the Panama Railroad upon the Isthmus of Panama for the said charge of rent, occupancy, etc. (R. pp. 17-20).

Attached to the Bill, and made a part thereof is article No. 627-31 issued by the Governor of Panama, providing for the method of securing and paying for quarters, rentals, fuel, water, electric current and other services (R. pp. 22-33). By sections 26 and 27 (R. p. 28) of said article 627-31 it appears that rentals of quarters will be collected in advance by payroll deduction and other charges will be deducted on the first of each month.

An order issued against the appellees to show cause why an injunction should not be granted (R. p. 34) and the appellees move to dismiss the bill on the ground that it was a suit against the United States and that the appellees were "acting in their respective official capacities by and under the direction of the President of the United States" and that the Court was without jurisdiction to enjoin a co-ordinate branch of the

United States Government in the exercise of its executive discretion (R. pp. 37-38). Said motion was sustained, the District Court filing an opinion (R. pp. 42-72) and the bill was dismissed (R. p. 73), and the appellant duly noted exceptions thereto (R. pp. 74-76). The assignment of error appears in pp. 80-89. In the Circuit Court of Appeals a motion to dismiss was filed by the appellees on substantially the ground that the only question before the Trial Court was the jurisdiction of the Trial Court and that appeal should have been taken directly to this Court (R. pp. 94-95).

The Circuit Court of Appeals denied the motion to dismiss filed in that Court but confirmed in its opinion the District Court (R. pp. 96-100), and affirmed decree of the District Court (R. p. 101). The errors assigned are fourteen in number and appear on pp. 102-105 of the Record.

ARGUMENT.

First, Eighth and Twelfth Assignments of Error.

(Record, p. 102-5.)

For convenience the first, eighth and twelfth assignments of error will be considered collectively because if the Act of August 24, 1912, had the effect of making the regulations concerning the furnishing of quarters, fuel, heat, current and services the law of the zone, then not only was the Executive Order of December 21, 1921, of no effect, but Congress had the exclusive right to change the laws and regulations of the Canal Zone and to make rules for the disposition of property of the United States on the zone, and Sec. 53 of the Laws of the Canal Zone is automatically continued and all executive orders issued since the Act of August 24, 1912, are inoperative, except in so far as they may be consistent with the laws, rules and regulations at that time in force.

From the inception of the work of digging and operating the canal, all American employees were furnished with quarters free of charge, or if they were not available commutation was allowed ranging from eight to fifteen per cent.

The Isthmian Canal Commission, created by the Act of Congress June 28, 1902, on September 3, 1904, adopted an Act known as Act Number Eight, Laws of the Canal Zone, Section 53, which is as follows:

> "The employees in the service of the Government in the Canal Zone, stationed on the Isthmus, whose salaries are $1,000.00 or more per year, shall be entitled to quarters, or in lieu thereof, in each case a sum equal to eight per cent of the annual salary at the option of the Commission." (Laws of the Canal Zone, Page 68).

And the Civil Service Commission published a circular with the above information as an inducement to prospective employees, the same being in the following language:

> "The Isthmian Canal Commission furnishes quarters to its American employees, or at its option in lieu thereof, commutation which has tentatively been fixed at eight per cent of the salary." Civil Service Form No. 1417 of December 3, 1904.

And all employees entering the service from 1904 until 1907 were given a written contract by the Isthmian Canal Commission, providing for free quarters and other privileges during the term of employment. Form No. 110, Office of Administration of Isthmian Canal Affairs.

The said Commission on February 13, 1907, adopted regulations governing employment setting forth the same privileges. Vol. I, Minutes of the Isthmian Canal Commission, 1905-1907.

When the Act of August 24, 1912, known as the Panama Canal Act, was passed, all the regulations of the Isthmian Canal Commission, including Sec. 53 of Act No. 8, were in force. Section 11 of the Panama Canal Act is as follows:

> "That all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone are hereby ratified, and confirmed as valid and binding until Congress shall otherwise provide."

And the final section (Sec. 14) of that Act says:

> "The right to alter, amend, or repeal any, or all of its provisions, or to extend, modify or annul any rule or regulations made under its authority is expressly reserved."

There appears to be no legislation of Congress repealing, annulling, extending, modifying, altering or amending any of these rules or regulations.

Under the authority of the Panama Canal Act, on January 27, 1914, the President abolished the Isthmian Canal Commission and continued to make executive orders until October 14, 1914, when the Attorney General ruled that the practice was illegal. Vol. 30, Ops. of Att'y Gen., Page 334.

An executive order was issued February 2, 1914, providing in the 17th section thereof that a charge would be made for rent, fuel and electric current in accordance with regulations thereafter to be established,

and on January 15, 1915, an executive order issued providing for the rent to be paid beginning March 1, 1915. This last order was revoked by an order of May 15, 1915, with the proviso "Free use of quarters, fuel, current, etc., does not extend beyond June 30, 1916."

On the 16th of June, 1916, the Attorney General rendered an opinion as follows:

> "From the foregoing I reached the conclusion that the term 'compensation' as used in the provision of Section 4, quoted above, refers to salaries or wages payable to employees as separate and distinct from privileges or allowances that may be granted them as to quarters, light and fuel, and that the money value of these privileges is not to be taken into consideration in fixing the salaries of employees in a permanent force of the canal. While obviously the question is not free from doubt, I have been influenced in reaching this conclusion by the thought that if Congress had intended to make it impossible for the Government of the Canal Zone to furnish to employees quarters, light and fuel free of charge—a practice which had long existed and of which Congress had knowledge—it would have employed to that end language more direct, more specific, and perhaps more emphatic than a general limitation upon the compensation of employees." Ops. Att'y Gen., Vol. 30, 548-553.

Finally there came the executive order of July 25, 1916, as follows:

> By virtue of authority vested in me by the Panama Canal Act approved August 24, 1912, it is hereby ordered:
>
> 1. That the Executive Order of January 15, 1915, No. 2,120, is hereby rescinded and abrogated.

2. That, effective July 1, 1916, officers and employees of the Panama Canal and the Panama Railroad Company on the Isthmus of Panama, shall be allowed, where available, quarters free of rent, and shall be furnished fuel and electric current free.

3. That the Governor of the Panama Canal is hereby authorized to assign officers and employees of the Panama Canal and of the Panama Railroad Company, such quarters as may be available for occupancy, and to make all rules and regulations necessary to govern the assignment and occupancy of such quarters, including rules and regulations relative to the furnishing of fuel and electric current to officers and employees of the Panama Canal and the Panama Railroad Company while occupying such quarters.

4. That officers and employees of the Panama Canal and the Panama Railroad Company, for whom quarters are not available or who do not occupy such quarters as may be assigned to them by the Governor of the Panama Canal, shall have no claim against the Government of the United States for commutation of quarters not furnished or not occupied, nor for fuel and electric current not furnished.

5. That all rules and regulations governing the assignment and occupancy of quarters heretofore promulgated by the Governor of the Panama Canal or the Isthmian Canal Commission, not inconsistent with the provisions of this Executive Order, are continued in full force and effect until they may be changed by regulations promulgated by the Governor of the Panama Canal under authority of this Executive Order; and all rules or regulations heretofore promulgated by the Governor of the Panama Canal in connection with the use and occupancy of quarters and the furnishing of fuel and electric current to officers and employees of the Panama Canal and the Panama Railroad Company, in-

> consistent with the provisions of this Executive Order, are hereby rescinded and abolished.

Although this Executive Order, last quoted, did not, in express words, repeal the provision of Section 17 of Executive Order of February 2, 1914, that—

> "A charge will be made for rent, fuel and electric current at such time and in accordance with such regulations as the President may hereafter establish,"

it was most evidently the intention and understanding of the President, the Secretary of War and all officials in charge of the Panama Canal Affairs, that such was the effect of the Executive Order of July 25, 1916. We so say because on dates of May 1, 1917, August 15, 1918, and December 1, 1920, the Panama Canal Commission, from its Washington office, issued and published broadcast throughout the United States an official circular entitled "Manual of Information Concerning Employments for the Panama Canal Service." (Form 151, The Panama Canal, Washington Office.)

Each of these several issues contains what purports to be a copy of the Executive Order containing general conditions of employment (Executive Order of February 2, 1914), and in each of these issues, Section 17 of the Order is quoted, OMITTING THE SENTENCE PROVIDING THAT A CHARGE WILL BE MADE FOR RENT, FUEL AND ELECTRIC CURRENT. Furthermore, in Section 21 of the Manual of May 1, 1917, in Section 20 of the Manual of August 18, 1918, and in Section 20 of the Manual of December 1, 1920, it is expressly stated that quarters with all necessary furniture are furnished to the employees, but that bed linen and similar articles must be supplied by the employee.

As stated above, Appellant and all of the 3,000 American employees of the Government upon the Isthmus of Panama, in the Canal and Panama Railroad service, in whose behalf he sues, were in possession and occupancy of such quarters, under the foregoing regulations, conditions and contracts, at the time this suit was brought, and are still occupying them.

Such was the condition when, on date of December 3, 1921, the President signed an Executive Order, which is quoted verbatim in the Transcript of Record (pages 11, 12, 13), providing that, effective January 1, 1922, the employees of the Panama Canal and of the Panama Railroad must pay, in the form of rent, to the Government enough money to provide 5 per cent for amortization and interest upon the investment of building such quarters and sufficient to cover their repairs, maintenance, and to cover removal of garbage and other works of sanitation. The rent charge must also cover estimated costs of repairs. Then it is provided that all repairs when made shall be again paid for by the employees. Apart from the collection under the guise of rent, the Executive Order provides that other charges shall be made for the use of water, fuel and electric current, all of which had been furnished to employees free of charge under the conditions under which they were employed.

By alleged authority of this Executive Order, Appellee-Defendant in Error, J. J. Morrow, Governor of the Panama Canal, issued orders to Appellees H. A. A. Smith, Auditor, and R. W. Glaw, Paymaster of the Panama Canal, to collect such charges by withholding and making deductions from the salaries earned by Appellant and his co-plaintiffs: deducting, on January 1, 1922, from the salaries earned for the month of De-

cember, 1921, as advance rent for January, 1922, and so on, month by month.

The salaries and wages earned by Appellant and all other employees for the month of December, 1921, were the compensation which had been fixed by the President under direct authority of Congress as given in the 4th Section of the Panama Canal Act of August 24, 1912. Money for the payment of that compensation, so fixed, was appropriated by Congress during the year 1921 in its Sundry Civil Bill for 1922. (Act of March 4, 1921.) And money for the payment of that compensation, so fixed and appropriated, and earned by Appellant and his fellow employees for the month of December, is now available unto Appellees for the payment in full of that compensation. The same may be said of the salaries and wages for each succeeding month.

Believing that the Executive Order of December 3, 1921, under which Appellees were threatening and about to act, is illegal; that it was made in excess of any authority given unto the President by Congress; that an unconstitutional act was about to be done; that they have a vested right in the privileges which they hold by established regulations and customs, confirmed by the Panama Canal Act and reiterated by the Executive Order of July 25, 1916; believing that they have vested right to receive their salaries fixed by authority of Congress and for which the money has been appropriated; and further believing that appellees have no right, power or authority, under the Constitution and laws of the United States to deprive them of their rights, privileges or any part of their salaries without due process of law, the American citizens in the Government employ upon the Isthmus of Panama, in the service of the Panama Canal and

Panama Railroad, by the Appellant brought this suit in the District Court for the Canal Zone, praying that Appellees be enjoined by a temporary order from carrying out said Executive Order; and that upon final hearing, Appellees and their successors in office be finally and perpetually enjoined therefrom.

While no temporary injunction issued the appellees by their attorney, agreed that the money so withheld would not be turned into the Treasury of the United States pending the hearing of this suit.

Let us see if we can ascertain the meaning of Congress as contained in Sections 2 and 14 of the "Panama Canal Act." It provides that "ALL Laws, orders, regulations and ordinances adopted and promulgated" are "RATIFIED AND CONFIRMED AS VALID AND BINDING UNTIL CONGRESS SHALL OTHERWISE PROVIDE."

By the same Act in Section 14, Congress expressly reserves to itself "The right to alter, amend or repeal any or all of its provisions, or to extend, modify or annul any rule or regulation made under its authority." "All," appearing in Section II is a most comprehensive term. It is defined thus:

> Completely, whole, the whole amount, quantity or number.
>
> It is frequently used in the sense of "each" or "every one of."
>
> Bouvier's Law Dictionary, Vol. I, citing 143 Mass. 442.
>
> This meaning is confirmed by numerous judicial decisions.

At the 120th meeting held on February 13, 1907, the Isthmian Canal Commission, formally adopted as a regulation the giving of free quarters, fuel, light, water

and other services. Minutes of Isthmian Canal Com. 1905-1907, Vol. I.

And no change up to the time of the passage of the Panama Canal Act was made either by Congress or the Commission. This practice was therefore a "Regulation" on August 24, 1912, and it seems perfectly obvious that Congress could have had no other intention than to make it a part of the law for the reason that this custom, practice or regulation was known to Congress many years prior to the enactment of the Panama Canal Act, and by use of the word "ALL" it must have intended to include "each and every one of" the regulations then in force.

Moreover, Congress itself, as well as the administrative officials of the Canal Zone, realize that the Panama Canal Act did have the effect of continuing in force "All laws, orders, regulations and ordinances adopted and promulgated" in the Canal Zone. This is shown by the passage of the Act of August 21, 1916, Ch. 371, 39 Stat. L. 527, which "until otherwise provided by Congress" authorizes the President to make rules and regulations, "in matters of sanitation, health and quarantine" for "levying, assessing and collecting" taxes, "regulating, licensing and taxing the use and operation of vehicles" and to "exercise police power." If Congress had not retained the exclusive right to legislate, why was this legislation necessary? The very language used in Sec. 2 of the Panama Canal Act shows Congress intended to include all sorts of regulatory provisions. The "laws" referred to are the "Laws of the Canal Zone," printed at the Government Printing Office and promulgated by the Isthmian Canal Commission and include Sec. 53 of Act 8 hereinbefore referred to. The "orders" were the various executive orders issued prior to the Act; the "regulations" means the enactments of the Commission and the "or-

dinances" were those enacted by authority of Act Seven of the Laws of the Canal Zone.

Laws of the Canal Zone, pp. 37-40.

It might be argued that it would have required an Act of Congress to make this practice of giving "free quarters, rent, etc.," to American employees the effect of law but Congress can ratify an Act the same as any principal may authorize an unauthorized act of a servant and when Congress so does, the acts ratified have the same effect as if they had been originally passed by Congress.

U. S. v. Eaton, 36 L. Ed., U. S. 591, 594.
Wilkins v. U. S., 96 Fed. 837, 841.
Grady v. U. S., 96 Fed. 238, 239.
Smith v. City of Shakopee, 103 Fed. 240, 241.
Dimmick v. U. S., 121 Fed. 638, 642.
U. S. v. Thurston Co., Neb., 143 Fed. 287, 291.
Smith v. Jackson, 241 Fed. 747, 759.

Second Assignment of Error.

(Record, p. 102-5.)

The Circuit Court of Appeals erred in holding that the Executive Order, January 15, 1915, was notice to Appellant and others that the practice of giving free rent and other services might be discontinued.

If, as we have seen in the argument covering the first assignment of error, Congress retained the exclusive right to legislate over such matters, then it must necessarily have followed that the Executive Order of January 15, 1915, in so far as it attempted to abrogate the "law" contained in Section 53 of Act 8, of the "Laws of the Panama Canal Zone" and the "Regulation" made by the Canal Commission on February 13, 1907, must be wholly inoperative and void as beyond

the power of the President, and could confer no authority on the Governor and other officials for the Canal Zone. An unauthorized act cannot be notice to any one, This is not a case where it is sought to control an officer of the government in discharging an official duty requiring the exercising of judgment and discretion.

Riverside Oil Company vs. Hitchcock, 190 U. S. 316.

But is rather one where the meaning of an Act of Congress is quite "Plain and unmistakable," and an administrative construction that undertakes in any way to modify such meaning is unwarranted.

Roberts vs. U. S., 176 U. S. p. 221.
Santa Fe Pacific Railroad Company vs. Lane, 224 U. S. 492.
U. S. vs. United Verde Copper Company, 196 U. S. 207.

An administrative officer of the government is powerless to make regulations that constitute statutes —his power to make regulations is confined to administrative matters.

U. S. vs. George, 228 U. S. 14.
U. S. vs. Copper Company, 196 U. S. 207.

Third Assignment of Error.

(Record, p. 102-5.)

The third assignment of error asserts that the Circuit Court should have given effect to the Executive Order of July 25, 1916. This order is effective only to the extent that it recognizes the injustice, invalidity and illegality of the order of January 15, 1915, and other orders that attempted to do away with the granting of free quarters and other privileges, and is un-

doubtedly the result of the opinions of the Attorney General rendered the 16th of June 1916 and October 14, 1914.

> Op's. of Attorney General, Vol. 30, pp. 334, 548-553.

And it was undoubtedly intended to repeal Section 17 of the Executive Order of February 2, 1914, providing for charge for rent, fuel and electric current in accordance with regulations to be thereafter made by the President for the reasons given in support of the argument on the first, eighth and twelfth assignments of error herein (See p. 4 of this brief).

In so far as the administrative officers of the Canal Zone may attempt, under authority of the order of July 25, 1916, to curtail, alter, modify or repeal the "Laws, orders, regulations and ordinances" in force on August 24, 1912, the date of the passage of the "Panama Canal Act," said order can have no force by reason of the arguments hereinbefore submitted.

Fourth Assignment of Error.

(Record, p. 102-5.)

The fourth assignment of error raises the question of the power of the President to dispose of property of the United States without specific authority of Congress. This is based on the second clause of Section 3, Article 4 of the United States Constitution, which says

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory *or other property* belonging to the United States."

In the territories Congress has the entire dominion and sovereignty, national and local, Federal and state,

and has full legislative power over all subjects upon which the Legislature or State might legislate within the State.

Simms vs. Simms, 175 U. S., 168.
U. S. vs. McMillan, 165 U. S., 510.

It may make a void act of the territorial legislature valid, and a valid act void.

Bank vs. Yankton County, 101 U. S., 133.
Utter vs. Franklin, 172 U. S., 423.

But the personal and civil rights of the inhabitants are secured to them by the same principles of constitutional liberty which restrain all the agents of government.

Murphy vs. Ramsey, 114 U. S., 44.

Section 45 of Circular No. 627-31, issued by the executive office of the Panama Canal, provides for renting of quarters to other than employees of the Canal, but no appropriation of public land can be made for any purpose except by the authority of Congress.

U. S. vs. Fitzgerald, 15 Pet., 421.
Utah Power Company vs. U. S., 243 U. S., 389.

Moreover the words "dispose of," used in Section 3 of Article 4, is held to vest in Congress alone the power not only to sell but to lease the land of the United States.

U. S. vs. Gratiot, 14 Pet., 537.

Congress has the absolute right to prescribe the mode of conveyance, the times and conditions thereof, and who shall be the grantees.

Gibson vs. Chouteau, 13 Wall., 99.
Emblem vs. Lincoln Land Company, 184 U. S. 664.

Congress likewise has the power to declare the effect of titles emanating from the United States.

Bagnell vs. Broderick, 13 Pet., 450.
Field vs. Seabury, 19 How., 352.

This control over its property is exercised to the same extent that an individual can control his property.

Light vs. U. S., 220, 523.

It has been held that the Treasury Department has no right to sell public property without the authority of an Act of Congress, and that it cannot ratify an unauthorized sale by the War Department.

U. S. vs. Nicoll, 1 Payne (U. S.), 646.

Moreover Congress specifically provides for the leasing of public lands in the Canal Zone to the "Head of a family" or a person "Over the age of 21," applying in good faith "for the purpose of actual settlement and cultivation," but in this Act no provision for the leasing of land for ordinary dwellings is made.

Act of Feb. 27, 1909, Ch. 224, 35 Stat. L. 658.

Fifth Assignment of Error.

(Record, p. 102-5.)

This assignment of error covers the question of whether the withholding of moneys from the appellant and those for whom he sues constitutes a "direct tax" and also is in conflict with Art. I, Sec. 9, Cl. 4 of the United States Constitution requiring "Duties, imposts

and excises" to be uniform throughout the United States (Record, page 103).

Appellant either owns an estate in the land which he occupies, or it is an incident or usufruct of his employment. We believe it is an interest similar to the situation that arises when a person has a license coupled with an interest, the interest being in this case the right to use the quarters and avail himself of the privileges, while in the Federal employment on the canal zone, and analagous to, if not the same as a common law tenancy from year to year. If this contention be correct undoubtedly the moneys withheld and threatened to be withheld constitute a direct tax.

The Attorney General on June 19, 1916, in construing the word "Compensation" used in Section 4 of the "Panama Canal Act" said it

> "Refers to salaries or wages payable to employees as separate and distinct from the privileges or allowances that may be granted them as to quarters, light and fuel, and that the money value of these privileges is not to be taken into consideration in fixing the salaries of employees in the permanent force of the canal."

Op's. of Atty. Gen., Vol. 30, pp. 548, 553.

A tax upon property holders in respect of their estates, or the rents therefrom, which cannot be avoided is a direct tax.

Hylton vs. U. S., 3 Dall., 171.
Veazie Bank vs. Fenno, 8 Wall., 537.
Springer vs. U. S., 102 U. S., 602.
License tax cases, 5 Wall. 471.

The framers of the Constitution intended a broad construction to be given to the phrase "Capitation"

because there was added the clause "or other direct tax," thus avoiding any construction which might narrow the intention.

Pollock vs. Farmers Loan, etc., Co., 157 U. S., 429.

Certainly if the appellees can carry into execution their intention as expressed in Circular 627-31 to deduct each month from the wages or salaries of the appellant and others for whom he sues, this deduction is "in respect of their estates" and "cannot be avoided."

Hylton vs. U. S.
Bank vs. Fenno.
Springer vs. U. S.
License Taxes Cases, *supra.*

As concerns Article I, Section 8, it is perfectly obvious that if this deduction for rental and other purposes is a tax on those situated like the appellant it is obviously not uniform, since the Executive Order of December 3, 1921, and the regulations framed to carry it into effect apply only in their very terms to the canal zone.

If we examine closely the Executive Order of December 3, 1921, and the circular designed to give it effect, it will be apparent that the object of the rent is to "amortize the investment on the basis of a total average life of thirty-six years, to return 5% for amortization and interest on the investment, and in addition to cover the amount fixed for expenditure and repairs due to ordinary wear and tear," etc.

Record, page 43, Section II of Executive Order, Dec. 3, 1921.

This meets the following definitions of taxes.

"Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs."

Cooley on Taxation, Vol. 1, page 1.

"A pecuniary burden imposed for the support of the government."

Bouvier Law Dic., citing 17 Wall., 322.

"A sum or rate imposed by governmental authority for a public object or purpose."

Id., citing 150 Pa., 118; 107 Mo., 464.

"The general object of taxation is the raising of revenue for government purposes."

People vs. Doe, 36 Cal., 222.

"Taxes are the revenue collected from the people for objects in which they are interested; the contributions of the people to things useful and conducive for their welfare."

Hilbish vs. Catherman, 64 Pa. St., 154.

Sixth Assignment of Error.

(Record, p. 102-5.)

This assignment of error is based on the claim that the injunction should have been granted preventing the appellees withholding moneys appropriated for the payment to appellant and those for whom he sues, which moneys have been properly appropriated.

We believe that this case is covered by the case of Smith vs. Jackson, 241 Fed. Rep., 747, affirmed in 246 U. S., 388, which was a case where the same appellees attempted to deduct from the salary of a Federal District Judge in the Canal Zone moneys to pay rent for the quarters occupied by him in the zone. It is said in the Jackson case that—

> "It seems to me that upon reason and authority, when the salary has been fixed by law and the money appropriated for its payment and the officer who controls the funds refuses to pay the salary to the one entitled thereto," mandamus is a proper remedy.

Further the court said:

> "It seems fair to say that if Congress had intended the judge to pay rent for the occupancy of a house in the Canal Zone, when it required him to reside there, it must be presumed that it would have been so stated in the Adamson Act. The law-makers knew that the United States Government was the owner of all buildings in the Canal Zone, and that the judge required to reside there must occupy one of those buildings. By way of reinforcement of this view it may be said that the members of Congress were familiar with the fact that under the acts or ordinances of the Isthmian Canal Commission the former members of the Canal Zone judiciary had occupied houses free of rent. Act one of the Isthmian Canal Commission of August 16, 1904, in referring to each of the Circuit and Supreme Court judges, provided as follows:
> "During his term of office he shall be furnished a dwelling house or apartment, or in lieu thereof a sum of money equal to 8% of his annual salary, at the option of the Commission."

The Adamson Act continued in operation all the acts of the Isthmian Canal Commission not repugnant to the provisions of that Act itself. This is shown by Section 2, paragraph 2, of the Act.

> "* * * This provision has direct reference to the Courts; consequently, when the Act required the judge to reside within the Canal Zone his occupancy of a house belonging to the Government or its subsidiary, in the Canal Zone, free of rent, when there had never been any stipulation for the payment of rent, cannot be considered an emolument. It was no increase of salary. It was no profit. His occupancy of the house as a residence constituted an incident, and perhaps also an inducement, to the discharge of his duty while away from his home in the United States."

The houses were erected not for rental purposes, but for the use of the employees of the Panama Canal and Panama Railroad and other governmental functionaries who might from time to time in the discharge of their official duties, be required to reside in the Canal Zone. * * * It will not be insisted that it was the intention of the United States to engage in the real estate business for profit, or that there was an intention on the part of Congress that a rental should be charged against judicial or other officers who were obliged to live in the Canal Zone. * * * It may be well to remember in connection that no private persons could erect a house on the Canal Zone for his individual use. The Judge was required by Act of Congress to reside in the Canal Zone and under the circumstances it was not possible for him to do so except by living in one of the houses owned by the Government. That he should occupy such house seemed to have been understood as being in the con-

templation of Congress. In the absence of any legislative expression it cannot be believed that it was the intention of the judge, whose office was created by Congress, and who was required to reside in the Canal Zone, should rent quarters from the Government or from any subsidiary governmental agency.

Smith vs. Jackson, 241 Fed. Rep., 747, affirmed in 246 U. S. 388.

Congress has from year to year in the Sundry Civil Bill appropriated money sufficient to pay the "salaries" or "compensation" fixed by the President pursuant to Section 4 of the "Panama Canal Act," and these moneys belong to the appellant and those for whom he sues, and the language of the "Panama Canal Act" in Sections 2, 14 and 4 (which allows the President to fix the "compensation of such persons" as may be necessarily employed "until such time as Congress may by law regulate the same"), is so "plain and unmistakable" that the appellees have no power or right to attempt to construe such language, and it is their duty to follow the plain meaning of these enactments and to give the appellant the relief sought.

Garfield vs. Goldsby, 211 U. S., 249.
Roberts vs. U. S., 176 U. S., 221.
Lane vs. Hoaglund, 244 U. S., 182.

Seventh Assignment of Error.

(Record, p. 102-5.)

The opinions of the Attorney General are entitled to great weight, and in so far as they have been expressed they undoubtedly hold that after August 24, 1912, the date of the passage of the "Panama Canal Act," the President had no power to change any of

the laws then in force in the Panama Canal Zone by an executive order.

Op's of Atty. Gen., Vol. 30, pp. 548, 552, 553.

Ninth and Tenth Assignments of Error.

(Record, p. 102-5.)

For convenience we will consider these assignments of error together because the reasoning applicable to one is applicable to the other. The assignments are based upon the theory that the appellant has either a property or vested right by contract or otherwise.

The question may be considered under these assignments whether as between appellant and the United States there exists simply the relationship of MASTER AND SERVANT or that of LANDLORD AND TENANT.

It is said in the case of Hughes vs. Chatham Overseers, 5 Mann. & G., 54, that "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will * * * and if he do so the servant becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration."

The opinion of Mr. Acting Attorney General John W. Davis to the Secretary of War, 30 Op's Atty Gen., 548, might be taken to intimate that in the conception of this official the use of quarters by employees was not entirely an incident to their employment, and that in their use the employees were not strictly within the sole relationship of master and servant with the Government but rather that of Landlord and Tenant, enjoying the use of their quarters under the terms of a gratuitous lease, or one for the consideration of

which the United States as Landlord received their labor and obtained the benefit of their presence upon the Canal Zone.

However, and under either phase of the case—whether the relationship between appellant and the United States be that of simply master and servant or that of landlord and tenant—authorities are hardly necessary to convince the Court that he, as well as his fellow-employees, have property rights and interests in the houses which have been given them for their occupancy during their employment. If the relationship be the former, then the use of quarters is part of the contract price or agreement made between the United States and appellant for his services, and he has the same right to, and property in, his quarters as he has to his salary.

> Bowman vs. Bradley, 151 Pa. 351, 17 L.R.A. 213, 217.

If the latter, then appellant has the same rights to and property in his quarters as any other tenant would have under a contract of lease, and the general law of landlord and tenant would apply.

We believe, however, from the majority of the cases, that the real relationship between appellant and the United States is simply that of master and servant; and the use of his quarters is an incident to his employment.

> Chatard vs. O'Donovan, 96 Am. Dec. 782, and notes on same at page 866 of notes at end of volume.
> Davis vs. Williams, 30 So. 488, 54 L.R.A. 749.
> Meade vs. Pollock, 99 Ill, Ap. 151.
> Bowman vs. Bradley, 151 Pa. 351, 17 L.R.A. 213.

School District No. 11 vs. Batche, 106 Mich. 330, 29 L.R.A. 576.
Bristor vs. Burr, 121 N.Y. 427, 8 L.R.A. 710.

We are further constrained in so believing because no one has been authorized or delegated by Congress to dispose of the dwelling houses upon the Canal Zone by lease, deed or otherwise, or to create the relationship of landlord in the United States as to Appellant and his fellow employees.

This being true, what, if any property right or interest has appellant to or in his quarters?

Underhill on "Landlord and Tenant," Vol. 1, p. 304, refers to Lightbody vs. Truelson, 39 Minn. 310, and quotes from Bowman vs. Bradley, *supra,* in support of his statement that where a servant is furnished a dwelling as an incident to his employment, and is dispossessed therefrom by the master or owner of the premises, the servant has a remedy against the master for damages for a breach of the contract of employment. If this be true, he has a property interest in his dwelling.

It must be remembered that the Canal Zone is a civil law jurisdiction. Our substantive code governing the rights of property is the Civil Code of Panama, very similar to the Civil Code of Louisiana.

Under the civil law the rights which plaintiff has acquired to his dwelling would be a usufruct, or use and habitation, which are defined in the Civil Code of Louisiana as follows:

Article 433:

"Usufruct is the Right of Enjoying a Thing. Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantages which it may produce, provided it

be without altering the substance of the thing."

Article 537:

"Usufruct is an incorporeal thing because it consists in a right."

Article 540:

"Usufruct may be established by all sorts of titles; by a deed of sale, by a marriage contract, by donation, compromise, exchange, last will, and even by operation of law."

Article 626:

"Use is the gift given to any one to make a gratuitous use of a thing belonging to another, or to exact such a portion of the fruit it produces, as is necessary for his personal wants and those of his family."

Article 627:

"The right of habitation is the right of dwelling gratuitously in a house the property of another person."

Article 628:

"The rights of use and habitation are established and extinguished in the same manner as usufruct."

Article 643:

"The right of habitation can neither be transferred, let, nor given to any one else; it is, as well as the use, exclusively a personal right."

These subjects are similarly treated in the Civil Code for the Canal Zone, Articles 182-192.

Relying upon the authority of the opinion of Attorney General Davis to the Secretary of War of June 19, 1916, Vol. 30, Op. Atty. Gen. 548, which was followed a month later by the executive order of President Wilson of July 25, 1916, giving to all employees of the Panama Canal and Railroad the use of quarters and other privileges during the term of their employment, we believe it cannot be doubted that a usufruct or right of habitation and use became vested in

appellant and his fellow employees; and that being a right, it cannot be taken from him without due process of law.

Although it might be true, as stated in the opinion of the Attorney General, *supra,* that the right of use and habitation of the quarters was not considered as part of the compensation authorized by Congress, but was given as an extra privilege to the employees, still it must be remembered that a use or right of habitation as stated in the Codes of Louisiana and of the Canal Zone, may be acquired by donation as well as by purchase. In the present case, while appellant has paid nothing to the Government for the right of use and habitation which he possesses, yet that right was given to him by the Government in its own interests; that is to say, it was one of the special inducements held out by the Government in order to bring its employees to the Isthmus of Panama, and keep them contented when once there!

The right of habitation is no less a right, and no less property, because it is incorporeal.

> "Incorporeal property is a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only, of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it."
> Nellis vs. Munson, 108 N.Y., 453.

Incorporeal property may be the subject of a gift or donation.

> 20 Cyc., 1211, citing Hester vs. Hester, 13 Lea (Tenn.) 189.

The right of use or habitation may be established by gift or donation.

Arts. 540 and 628, Civil Code of Louisiana, and same provisions contained in Arts. 825 and 871 of Civil Code of Canal Zone.
"Donatio perficitur posesione accipientis."
Adams Glossary.
Brooms Leg. Maxims.
14 Cyc. 867.

When the Government offered and promised to give appellant the right of habitation and use of a certain dwelling house during the term of his employment and established laws, rules and regulations and made Executive Orders to the effect, and did actually assign appellant to such habitation thereof; and appellant accepted the use and habitation of the house and took possession thereof then the right of habitation of said house, for the term of employment, became perfect and complete as between appellant and his donor, and appellant acquired a property interest in the use of said house.

> "A gift inter vivos when perfected, unless obtained by fraud, duress, or undue influence, operates as a complete transfer of the subject thereof from the donor to the donee, and the title thereby acquired by the donee is as good as between the parties and those claiming under them as a title acquired by deed or purchase."
> 20 Cyc., 1216, and cases cited in note 99, especially Hatch vs. Lamos, 4 L. R. A., 404.

The United States through the President, having given the use of dwelling houses to the employees on the Isthmus, and said gift having been made complete by acceptance, a succeeding President cannot revoke the gift. If the right of habitation be thus taken away from appellant it deprives him of his property without due process of law.

The Court erred in holding that no property rights of appellant will be effected by the threatened acts of Appellees, in depriving appellant of his right of habitation, acquired by donation from the Government.

But the learned Courts below have obviously overlooked the fact that appellant's complaint also charges that appellant and his co-plaintiffs have worked for the Government during the month of December 1921, at salaries fixed by authority of Congress, and have earned wages that are now due and for the payment of which money has been appropriated by Congress. That the money so appropriated is now in the hands of appellees, and that appellees are threatening to make unlawful deductions from that money and to withhold the payment of part thereof from appellant and his co-plaintiffs.

That Appellant has not a property interest in his wages so earned and in the money which Appellees are threatening to deduct therefrom, scarce need be argued.

This case is on all fours in this respect with the case of Smith vs. Jackson, 241 Fed., 747, affirmed in 246, U. S. 388.

Judge Jackson was appointed under the authority of Sec. 8 of the Panama Canal Act, providing that there shall be a District Judge, to be appointed by the President, and to receive the same salary as is paid to District Judges in the United States. His salary was appropriated by the Sundry Civil Act of March 3, 1915.

Appellant and all of his co-plaintiffs were appointed under authority of Sec. 4 of the same Act of Congress, providing that "all persons necessary for the completion, etc.—shall be appointed by the President or by his authority—and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may, by law, regulate the

same." The compensation was fixed; Appellant and his fellow employees have performed their services and Congress, by the Sundry Civil Act of March 4, 1921, has appropriated the money for the payment of that compensation, so fixed under the authority of the Panama Canal Act.

The Sundry Civil Appropriations Act of March 4, 1921, in so far as it relates to appropriations for the Panama Canal, reads:

> "For every expenditure requisite for and incident to the maintenance and operation, sanitation, and civil government of the Panama Canal and Canal Zone, including the following: Compensation of all officials and employees * * * all to be expended under the direction of the Governor of the Panama Canal and accounted for as follows: For maintenance and operation of the Panama Canal: $7,250,000. For sanitation * * * and Canal Zone * * * $900,000. In all $9,000,000 to be available until expended."

Appellant's salary has been appropriated, and is just as much due unto him, as was Judge Jackson's in the Smith-Jackson case. Appellant has exactly the same property interest in his salary as Judge Jackson had in his. The fact that Judge Jackson was a judge, was a mere incident of that case, and not the controlling principle of the decision. The Appellant, who is engaged in the work of operation and maintenance of the Canal and his three thousand fellow-employees who are employed in the works of operation, maintenance, sanitation and civil government are just as essential to the canal project, and are entitled to the same protection of law as was the judge.

The deduction is being made from Appellant, as it was from Judge Jackson, for an alleged charge for rent arbitrarily fixed, without the agreement or consent of Appellant, and in violation of the agreements and conditions under which he and his fellow-employees were employed. And furthermore, as was not urged in Judge Jackson's case, the present charge against Appellant is being made contrary to law and in excess of any authority to charge for or collect the same.

The deduction made from Judge Jackson's salary was not openly stated as in this case to be for the purpose of providing, among other things, 5 per cent for amortization and to return interest on the investment of building the houses which have been builded and used in the past for the purpose of constructing the Canal.

Appellant clearly has a property interest in the money which is thus being withheld from him, and he has been deprived of that property without any process of law whatsoever.

> "It seems to me," said Judge Clayton—and his language was adopted and approved by this Honorable Court—"that upon reason and authority, when the salary has been fixed by law and the money appropriated for its payment, and the officer who controls the fund refuses to pay the salary to the one entitled thereto, mandamus is the proper remedy and the only remedy which the aggrieved party can invoke for the protection and enforcement of his rights."
>
> Smith vs. Jackson, 241 Fed. 747, 776.

If that be good law, then the correlative must likewise be true, that when Appellant's salary has been fixed by law, i. e., fixed by the President under direct

authority and direction of an Act of Congress, and the money appropriated for its payment, and the officers who control the fund threaten and are about to withhold it, or refuse to pay it, then injunction is the proper and only remedy which the aggrieved party may invoke for the protection of his rights and to protect himself and his property from irreparable injury and loss.

We respectfully contend that the Court committed grievous error in holding that Appellant has no property rights which the Court has jurisdiction to protect.

Eleventh Assignment of Error.

(Record, p. 102-5.)

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding, under authority of the case of Bruce vs. Manchester & King Railroad, 117 U. S. 514, that the appellant, Harvey McConaughey, is the sole plaintiff in this cause, and in failing to hold that all those in whose behalf he sues, as set forth in his complaint, are co-plaintiffs in his action.

The case of Sheppard against the Railroad on the authority of which the above holding was made is not analagous because the court's jurisdiction in that case was invoked on the ground of diverse citizenship, and the amount in controversy between the plaintiff and defendant did not reach the jurisdictional amount of $5,000.00 anywhere under that procedure, but this is a case where a constitutional right is invaded, and the amount in controversy is immaterial.

Thirteenth and Fourteenth Assignments of Error.

(Record, p. 102-5.)

The thirteenth and fourteenth assignments of error are based on the Circuit Court of Appeals affirming the Trial Court, and not reversing the Trial Court.

Counsel respectfully urges in support of these assignments all that has been said in connection with the argument on the first, eighth, and twelfth assignments, and in addition begs leave to show the court that the authorities actually in charge of the Government of the Canal Zone and operation of the Canal railroad, as well as Congress, knew and understood that Section II of the Panama Canal Act had the effect of continuing in force the regulations made before the passage of said Canal Act by authority of the President by the Isthmian Canal Commission. We have seen that the Act of August 21, 1916, was expressly passed to give the President power heretofore referred to. On November 5, 1914, Mr. Frank Feuille, the then Special Attorney for the Panama Canal, submitted to Col. Goethals, the then Governor of the Canal, a brief opposing the opinion of the Attorney General of October 14, 1914, arguing that the President had power to make all needful regulations. The brief was submitted by the Secretary of War to the Attorney General for his opinion, and the Secretary of War received the following reply:

Office of the Attorney General.
Washington, D. C.,
January 16, 1915.

Hon. Lindley M. Garrison,
Secretary of War.

Dear Mr. Secretary:

I acknowledge receipt of yours of the 4th inclosing copy of a memorandum dated November 5th, 1914, addressed to Colonel Goethals by Mr. Frank Feuille, Special Attorney on the Isthmus, on the subject of amending the Penal Code, and asking whether the points brought out in this memorandum in any way modify my formal

opinion given to the President on October 14, 1914.

After giving careful consideration to this memorandum, I am constrained to adhere to my opinion of October 14th, above referred to. In addition to what is stated in that opinion, I call your attention to additional evidence of the intent of Congress in passing the legislation in question which I omitted in the former opinion;

In the hearing before the Committee on Interstate and Foreign Commerce, second session, Vol. 3, pages 245 to 248, held on February 12, 1912, the Secretary of War, Henry L. Stimson, testified and submitted a draft of a bill prepared by Judge Feuille. Section 2 of this bill read as follows:

Section 2. That, subject to the provisions of this acts, all the civil and military powers of the United States in the Canal Zone are hereby vested in the President of the United States, including the power to make all laws, rules or regulations necessary for the government of the Canal Zone and for the construction, maintenance, and operation of the Panama Canal, as well as all the rights, powers and authority granted to the United States by the terms of the treaty described in Section 1 of this act.

The power and authority hereby conferred upon the President may be exercised by him through such persons as he may designate from time to time, and in the manner as he may direct, for the government of the Canal Zone and the maintenance and protection of the inhabitants thereof in the free enjoyment of their liberty, property, and religion, and for the construction, maintenance, and operation of the Panama Canal. All orders and regulations with respect to the government of the Canal Zone heretofore made by the President, or pursuant

to his directions and authority, are ratified and confirmed without prejudice to the power of the President to revoke or amend the same in accordance with the authority granted to him by this act.

And the President in his discretion may create and organize a civil and political establishment for the government of the Canal Zone, with power to sue and be sued, and with such other governmental powers as to him may seem necessary and convenient to carry out the purposes of this act; and he may order, reorganize, abolish, or re-create any such establishment when in his judgment is it necessary to do so.

It will be noted, from the words contained in the above bill "without prejudice to the power of the President to revoke or amend the same in accordance with the authority granted to him by this act, and the previous words vesting in him "the power to make all laws, rules, or regulations necessary for the government of the Canal Zone," that the Bill contemplated granting the President specific power to legislate.

The bill, however, as reported by the Committee in the succeeding March (Mr. Adamson being of the Committee), struck out these provisions.

From the above it will be seen that the attention of the Committee was specifically called to the question as to whether it should vest the President with legislative power, and a bill containing specific and appropriate language for this purpose was presented to the Committee by the then Secretary of War. The Committee, however, did not adopt a bill containing such powers.

Faithfully yours,
(Sgd.) T. W. Gregory,
Attorney General.

(See File, Rec. Bu., P. C., Bal Hts., 94-L 6)

Later on, Judge Feuille prepared a proposed amendment to Section II of the Panama Canal Act, which read as follows:

> "Section 2. That all laws, orders, regulations ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone, and the sanitation of the cities of Panama and Colon and their adjacent harbors, and the construction and operation of the Canal, are hereby ratified and confirmed as valid and binding without prejudice to the power of the President to alter, amend or repeal the same."

This amendment was submitted to Mr. Fitzgerald, Chairman of the House Appropriations Committee, and evidently was given due attention by Congress, who declined to enact it. See Annual Report, Governor Panama Canal for year 1915, page 460. See also, Rec. Bu., P. C., Bal. Hts., File 94-L-6.

When it was found necessary that some existing police, sanitation and quarantine ordinances be changed, and that automobile regulations and rules of the road be made and promulgated, we find Col. Goethals, the then Governor of the Panama Canal, writing the following letter to the Secretary of War:

> Balboa Heights, November 18, 1915.
>
> The Honorable
> Secretary of War,
> Washington, D. C.
>
> Sir: I beg to acknowledge the receipt of your letter of the 4th instant relative to tax on automobiles in the Canal Zone.
>
> When the Committee on Appropriations visited the Isthmus a year ago, the difficulties that were met in the administration, due to the

fact that under the interpretation of the Attorney General the President could not modify or revoke Executive Orders issued prior to the passage of the Panama Canal Act, were discussed, and at the suggestion of the Chairman of the Committee, a provision was drafted with the hope that it might be incorporated as an item in the Sundry Civil Bill making appropriations for the Canal. The suggested amendment was submitted to the Chairman of the Committee on Interstate and Foreign Commerce, who objected to the insertion of the provision, and also to any change in the Panama Canal Act which would give the authority to the President of making laws for the Canal Zone. A revision of the laws was suggested, with a view of submitting them to the action of Congress, but conditions are constantly changing on the Isthmus as to make this method impracticable, and it was hoped that Congress might see its way clear to authorize the President to take action in administrative matters, and it was intended to make another appeal to Congress at the coming session with this in view.

Congressman Adamson, Chairman of the Committee on Interstate and Foreign Commerce in the last Congress, visited the Isthmus recently for the purpose of conferring with me about existing conditions, and with regard to any legislation that might be needed. In addition to the tolls, this question of amending Section 2 of the Panama Canal Act was discussed with him at some length, but he felt that legislation in such form would not be enacted. The inconveniences that would result from having Congress make police ordinances for the Canal Zone, which might need amendment very soon after their enactment, insomuch as the transition period from construction to operation is still on, was brought to his attention, and Mr. Adamson finally suggested that Congress could authorize the Presi-

dent to establish rules and regulations for the various activities of the Panama Canal not provided for, and such an act could carry with it a penal provision for any violation of the rules and regulations that might be established by the President.

Under these circumstances a Bill will be drafted along the lines suggested by Mr. Adamson, for submission to Congress through you. If this be enacted it will enable the modification of the automobile tax you desire. The rate of taxation for automobiles is high and should be modified. A reasonable rate that would be recommended in case the President had authority to act, would be ($10 per annum for automobiles of 29 h.p. or less, $15 for automobiles of 30 h.p. or more, provided the automobiles are for personal use only. When such automobiles are used for hire, the rate should be doubled. For trucks and busses the rate for Class 1, less than 1 ton, $20; for Class 2, one to three tons, $30; for Class 3, three tons or more, $40; for motorcycles, $5 per annum. We should however, agree to issue reciprocating licenses with Panama, for automobiles for personal use only, $3 and $5, respectfully, automobiles for hire, $10 and $15, respectively, motorcycles, $2 per annum, and for trucks and busses, $10, $15, and $20, respectfully.

Respectfully,
(Signed) Geo. W. Goethals.

In duplicate
GWGccm.

See File, Rec. Bur., P. C., Bal. Hts.,
28-H-16; 51-H-12, Part I.

On date of March 15, 1916, Mr. Frank Feuille, the then Special Attorney for the Panama Canal addressed a letter to Lt. Col. Chester Harding, acting Governor

of the Panama Canal, in which Judge Feuille made the following statement:

> "I am enclosing herewith a draft of a proposed bill for submission to Congress, through proper channels, on the subject of licenses on motor vehicles operated in the Canal Zone; prohibiting the use of flare lights on vehicles except under special conditions; limiting the speed of motor vehicles; * * *.
>
> "Section II of the Panama Canal Act ratifies and confirms all orders and resolutions issued by authority of the President, until such time as Congress shall otherwise provide. The Attorney General of the United States has ruled that the Executive Orders issued prior to the Panama Canal Act are not subject to amendment by the President, and can only be amended by Congress. Mr. Adamson, Chairman of the Committee on Interstate and Foreign Commerce in the House of Representatives, concurs in that opinion * * *
>
> Respectfully,
> (Signed) FRANK FEUILLE,
> *Special Attorney.*
>
> ff/ws.
> Enclosures.
>
> See Files, Record Bur. P. C. Bal. Hts. 28-H-16; 51-H-12, Part I.

Finally, as the result of nearly two years' strenuous effort on the part of the Governor of the Panama Canal, the Secretary of War, the Special Attorney, Judge Feuille, and others, Congress passed the Act of August 21, 1916, by which a few limited powers were given to the President to make or change any of the regulations which had been ratified and continued upon the Canal Zone by the ratification clause of the Panama Canal Act.

By Act of August 21, 1916, the President was authorized:

1. To make rules in matters of sanitation, health and quarantine;
2. To make rules and regulations for the levying, assessing and collecting of certain taxes;
3. To make rules of the road, and regulations concerning the taxing and operation of motor vehicles; and
4. To make port regulations, concerning immigration.

(See Ex. Order of Feb. 6, 1917.)

It required a special Act of Congress (Act of August 21, 1916) to allow the President to change, modify, repeal, alter, or amend anything that has been enacted as law, regulations, orders, or ordinances prior to the enactment of the "Panama Canal Act." It is significant that that portion of the proposed bill which would have given the President the power to change regulations theretofore made was striken out by Congress.

> "The proceeding of the legislature in reference to the passage of an act may be taken into consideration in construing the act. Thus the reports of committees made to the legislature have been held to be proper sources of information in ascertaining the intent or meaning of the act. Amendments made or proposed and defeated, may also throw light on the construction of the act as finally passed, and may properly be taken into consideration."
>
> Lewis' Sutherland Statutory Construction, Vol. II, par. 470.

> "The intention of the lawmaker constitutes the law."

Atkins v. Fiber Co., 18 Wall., 272: 21 L. Ed. 841.
Jones v. New York G. & I. Co., 101 U. S. 622: 25 L. Ed. 1030.

A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter.

United States v. Babbit, 1 Black, 44; 17 L. Ed. 94.

A legislative act is to be interpreted according to the intention of the legislature.

Wilkinson v. Leland, 2 Pet. 627; 7 L. Ed. 542.
Priestman v. United States, 4 Dall. 28: 1 L. Ed. 727.
Binney v. C. & O. Canal Co., 8 Pet. 201: 8 L. Ed. 917.
United States v. Fisher, 2 Cranch, 358; 2 L. Ed. 304.
Indianapolis & St. L. Co. v. Horst, 93 U. S. 291: 23 L. Ed. 898.
The Paulina v. United States, 7 Cranch, 52: 3 L. Ed. 266.

Statutes are to be construed to give effect to the presumed and reasonably probable intention of the legislature.
Webster v. Cooper, 14 How. 488: L. Ed. 510.

It cannot be reasonably construed, under the principles of American Government, that Congress intended to give to the President as to the Panama Canal and the Canal Zone, unrestricted powers of government over which the courts can exercise no direction. There cannot be such an autocrat. The Government of the United States cannot be reduced to a bureaucracy.
Smith vs. Jackson, 241 Fed. 747, 758. affirmed in 246 U. S., p. 388.

> In whatever language a statute may be framed, its purposes and its constitutional validity must be determined by its natural and reasonable effect.
>
> Henderson v. Wickman, 92 U. S. 259: 23 L. Ed. 543.

For the reasons above given it is most respectfully submitted that this cause should be remanded to the District Court of the Canal Zone with instructions to grant the relief prayed if proof shows the facts stated in the Bill to be true.

Respectfully submitted,

HARRY A. HEGARTY,
JOHN N. BREEN,
Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 48

HARVEY McCONAUGHEY, for himself and others, employees of The Panama Canal and of the Panama Railroad Company, Appellant,

versus

J. J. MORROW, Governor of The Panama Canal; H. A. A. SMITH, Auditor of The Panama Canal; and R. W. GLAW, Paymaster of The Panama Canal.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEES

G. H. MARTIN,
District Attorney, Canal Zone,
Attorney for Appellees.

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IN THE SUPREME COURT OF THE UNITED STATES

HARVEY MCCONAUGHEY,
et al, employees of The Panama Canal and Panama Railroad Company.

vs.

J. J. Morrow, H. A. A. Smith, and Robert Glaw.

No. 48

STATEMENT OF THE CASE.

This is an appeal to this court from the judgment and decree of the United States Circuit Court of Appeals, Fifth Circuit, filed April 11, 1922. The action was originally brought in the United States District Court for the Canal Zone to enjoin J. J. Morrow as Governor of The Panama Canal, H. A. A. Smith its Auditor, and R. W. Glaw its Paymaster, from deducting from the compensation of the plaintiff and others a charge for rent, fuel and lights under the Executive Order of the President of the United States of December 3, 1921. (Transcript of Record, pp. 2 to 33.) The defendants appeared and by motion to dismiss challenged the jurisdiction of the District Court as to the parties and the subject matter of the action on the grounds that:

(1) The suit was in effect a suit against the United States;

(2) The defendants are officials of the executive branch of the United States, acting in their several capacities by and under the direction of the President of the United States; and

(3) The Executive is a coordinate branch of the Government and can not be enjoined by the judicial

branch of the Government. (Transcript, pp. 37–38.)

This motion was sustained and the action dismissed by judgment of said District Court duly made and entered January 5, 1922 (Transcript, pp. 39 to 73), and appeal and writ of error were prosecuted by the plaintiffs to said Circuit Court of Appeals (Transcript, pp. 77 to 92). On March 8, 1922, these respondents filed in said Circuit Court of Appeals a motion to dismiss the appeal on the ground that there was no right of appeal in the action to the Circuit Court of Appeals, but only a right of appeal to the Supreme Court of the United States under Section 238 of the Judicial Code, and jurisdictional grounds (Transcript, pp. 94–95). On April 11, 1922, the said Circuit Court of Appeals duly filed its opinion and entered its judgment affirming the judgment and decree of said District Court. (279 Fed. 617.) (Transcript, pp. 96–101.)

ARGUMENT.

The Appellees submit the following points and authorities:

I.

THAT THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION OF THE APPEAL IN THIS ACTION, AND CONSEQUENTLY THIS COURT HAS NO JURISDICTION.

The jurisdiction of the Circuit Court of Appeals is defined by Section 128 of the Judicial Code of the United States (36 Stat. L., p. 1133, as amended by 38 Stat. L., p. 803). So far as that section is applicable to this case it provides for appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts—in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section 238.

It follows therefore that the Circuit Court had no jurisdiction in this case if the appeal or writ of error might have been taken directly to the Supreme Court.

Section 238 of the Judicial Code of the United States (36 Stat. L., p. 1157, as amended by 38 Stat. L., p. 803) provides what appeals and writs of error may be taken from the District Courts directly to the Supreme Court. The provision of this section applicable to this case is as follows:

> "In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It seems to the Appellees by the express enactment of Congress that these statutes deprived the Circuit Court of Appeals of jurisdiction to entertain, consider and decide this action, for the question of jurisdiction was the sole question in the case. Authorities on this point are numerous, and only a few of them will be cited, in support of the following rule:

"The Circuit Court of Appeals is without jurisdiction of an appeal from a decree of a District Court dismissing an appeal on the ground of want of jurisdiction; the power to review is exclusively in the Supreme Court."

> Chamberlain et al, *v.* Q. & C. Co., et al., 260 Fed., 933;
> Shapley *v.* Cohoon, 263 Fed., 893;
> Blumenstock Bros. etc., *v.* Curtis Pub. Co., 258 Fed., 927;
> Nickels *v.* Pullman Co., 263 Fed., 551;
> U. S. *v.* Brown, 281 Fed., 657, at 659.

From the foregoing decisions it appears to be settled that the Circuit Court had no jurisdiction to entertain or decide this controversy, unless some provision of the Act of Congress of August 24, 1912, known as "The Panama Canal Act," enlarged the appellate jurisdiction of the Circuit Court of Appeals to entertain appeals

from final judgments of the District Court of the Canal Zone. Section 9 of the Panama Canal Act (37 Stat. L., p. 560) relating to this matter is as follows:

> "The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the District Court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charged is punishable as a felony. And such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said circuit court of appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States."

It seems to me apparent from this provision that the Circuit Court of Appeals of the Fifth Circuit, in appeals from the judgments and decrees of the District Court of the Canal Zone, has no greater jurisdiction than that court or any other Circuit Court of Appeals would have under Sections 128 and 238 of the Judicial Code of the United States, heretofore cited. This view is confirmed by the action of Congress in the enactment of an amendment to Section 9 of the Panama Canal Act (42 Stat. L., 1004), wherein the portion of Section 9 above quoted is made to read as follows:

> "(*b*) The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdic-

tion to review, revise, modify, reverse, or affirm the final judgments and decrees of the district court of the Canal Zone, and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, and in cases in which the value in controversy exceeds $1,000, to be ascertained by the oath of either party or by other competent evidence, and also in criminal cases wherein the offense charged is punishable as a felony; *and also in civil and criminal cases in which the jurisdiction of the court is in issue, but whenever any such case is not otherwise reviewable in said appellate court the question of jurisdiction alone shall be reviewable by said appellate court.* And such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States. *Cases pending in the said Circuit Court of Appeals at the time of the passage of this Act shall not be affected hereby, but the same shall be disposed of as though this Act had not been enacted.*"

It will be noted from the italicized portions of the amendment made in 1922 that the Circuit Court of Appeals is given specific jurisdiction upon appeal from the Canal Zone court of jurisdictional questions—a jurisdiction it did not before have. This is plainly an interpretation by Congress of the original Panama Canal Act that the same did not confer this jurisdiction. The quoted terms of the amendment also show that this action, which was decided in April, 1922, was not, and is not to be, in any manner, affected by the amendment.

It therefore appears that the Circuit Court of Appeals for the Fifth Circuit had no jurisdiction of this action; had no power or authority to decide it; and consequently this court has no jurisdiction.

II.

THIS SUIT IS, IN EFFECT, A SUIT AGAINST THE UNITED STATES, AND IT HAS NOT CONSENTED TO BE SUED, RESULTING IN LACK OF JURISDICTION IN THE COURTS.

It appears in this proceeding that certain lump sum appropriations have been made by the Congress of the United States for certain specific purposes, one of which is the maintenance and operation of the Panama Canal. It is the contention of the appellants that these appropriations were made, in part, for the purpose of paying the compensation of those employed under the authority of the President in maintaining and operating the Panama Canal, and this is conceded. Under the plain power given to the President to maintain and operate the Canal and employ such persons as he may see fit for that purpose, the President, or those to whom he has delegated the authority, has the power to agree with the employees upon the compensation which each shall receive. Doubtless this was done in the case of the plaintiff and every other person employed in the maintenance and operation of the Canal. This is an agreement between master and servant, and is subject to any offsets or deductions which the master may have against the wages or salary or compensation of the servant. The appellees are assuming for the purposes of this argument that the President had the authority to require payment for rent, water, fuel and lights in quarters used by employees of the Government on the Canal Zone. What the appellants are seeking to do in this case

indirectly is, (1) to increase their compensation beyond the amount agreed upon, or (2) to have the use of the property of the United States without compensation. In the first case, if they are successful the money appropriated by Congress will be depleted to the amount measured by the charges for rent, water, fuel and lights, or, in the second case, the property of the United States will be used by the appellants without paying any compensation therefor. In either event this action is a suit against the United States, and the effect of a judgment in favor of the plaintiffs would be to burden the revenues of the United States by a considerable amount or grant to the appellants a right to the use of Government property without compensation.

The United States being, therefore, the real party in interest and the only party whose property rights will be affected by a judgment in this action, and the United States not having consented to be sued, the District Court was without jurisdiction of the subject matter of the action; was correct in its judgment dismissing the case, and this Court should dismiss the case for lack of jurisdiction.

Carr *v.* U. S., 98 U. S., 433.
Stanley *v.* Schwalbey, 162 U. S., 255.
Minnesota *v.* Hitchcock, 185 U. S., 373.
Oregon *v.* Hitchcock, 202, U. S., 60.
Kansas *v.* U. S., 204 U. S., 331 at 341.
Louisiana *v.* McAdoo, 234 U. S., 627.
Walker *v.* Ford, 269 Fed., 877.

III.

THE APPELLANTS SEEK BY INJUNCTION, TO RESTRAIN THE PRESIDENT AND THOSE ACTING BY HIS AUTHORITY, IN THE PERFORMANCE OF EXECUTIVE DUTIES, INVOLVING THE EXERCISE OF JUDGMENT AND DIS-

CRETION, RESULTING IN LACK OF JURISDICTION IN THE COURTS TO INTERFERE THEREWITH.

In a case of this kind an injunction can not issue against the United States or officers of the United States acting under the authority of the Executive.

Belknap *v.* Schild, 161 U. S., 10.
Louisiana *v.* McAdoo, *supra.*

The appellees do not contend that subordinate officers of the United States may not be proceeded against by mandamus or by writ of injunction where the performance of duty is merely ministerial, where the performance thereof is not accompanied by the exercise of judgment and discretion on the part of the official, nor in those cases where the subordinate officer is acting illegally and without authority of law, and where great or irreparable injury will result from a continued performance of the illegal acts. But this is not such a case, all of which will be pointed out in this brief in the following pages.

The President of the United States can not be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional; and it makes no difference whether such incumbent be described in the bill as President or simply as a citizen of a State.

Mississippi *vs.* Johnson, 4 Wall, 475.

In this case the distinction between the legislative, executive, and judicial branches of the Government is clearly pointed out, and with equal clearness it appears that no department can invade the domain or restrain the exercise of the powers of any other department. This court uses the following language with respect to the matter:

> "The Congress is the legislative department of the government; the President is the executive

department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences."

* * * * * * *

"It has been suggested that the bill contains a prayer that, if the relief sought can not be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office can not be received, whether it describes him as President or as a citizen of a State."

The courts will not interfere with the ordinary functions of the executive department of the Government.

Louisiana *v.* McAdoo, *supra.*
N. Y. Guaranty Co. *v.* Steel, 134 U. S., 230.
Louisiana *v.* Jumel, 108 U. S., 711.
Hopkins *v.* Clemson College, 221 U. S., 636.

In Marbury *v.* Madison (1 Cranch, 137) the Supreme Court of the United States, in discussing the relations existing between the President of the United States and the heads of departments, uses the following language:

"The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hestitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful

that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the Cabinet, and to intermeddle with the prerogatives of the Executive.

"It is scarcely necessary for the courts to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the Executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court."

* * * * * * *

"Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."

* * * * * * *

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual

> rights, and being intrusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts."

The rules so announced are particularly pertinent in this case. All the acts of Congress from the inception of the undertaking to construct an interoceanic canal across the Isthmus of Panama place the control of that undertaking in the hands of the President and such subordinate officers as he may designate. These subordinate officers must conform precisely to the will of the President. They are the mere instruments by which that will is translated into action. The first act of Congress, approved June 28, 1902, (32 Stat. L., p. 481), authorizing the President to acquire the territory now known as the Canal Zone, created an Isthmian Canal Commission, and in Section 7 thereof said act provides:

> "Said Commission shall in all matters be subject to the direction and control of the President, and shall make to the President annually and at such other periods as may be required, either by law or by the order of the President, full and complete reports of all their actings and doings * * * *."

Said act further empowered the President to acquire the properties of the French Canal Company, to acquire the right of way for the Canal and the Canal Zone, to pay for the property, and, through the Isthmian Canal Commission, cause to be excavated, constructed and completed a ship canal from the Caribbean Sea to the Pacific Ocean.

April 28, 1904, Congress enacted a law (33 Stat. L., 429) wherein the President was authorized to acquire the Canal Zone and to pay therefor which, contained the following provision:

> "Sec. 2. That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property and religion."

Under these laws the President appointed an Isthmian Canal Commission, and that Commission continued to function until the year 1914. Under that commission not only was the Canal constructed, but the Canal Zone was put in a sanitary condition and governed under the laws, rules and regulations established by the Isthmian Canal Commission.

August 24, 1912, Congress enacted another law (37 Stat. L., 560), known as "The Panama Canal Act," wherein, in Section 3, the President is authorized to declare that the Canal Zone is necessary for the construction, maintenance, and operation, sanitation or protection of the Panama Canal, and to extinguish all claims and titles of adverse claimants and occupants; in Section 4, that when, in the judgment of the President, the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive

Order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist, and authorized the President thereafter to complete, govern, and operate the Panama Canal, and govern the Canal Zone, or cause them to be completed, governed and operated through a Governor of The Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone; and authorized the President to appoint a Governor of the Canal Zone and

> "all other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may, by law, regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than 25 per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States."

By Section 5 the President is authorized to prescribe the rate of tolls that shall be paid by vessels passing through the Canal; and various other powers were conferred upon the President by the terms of this act.

From a consideration of these several enactments it appears that the Congress has conferred upon the President, unless expressly reserved, full and complete power and authority; First, for the construction of the Canal, and, Secondly, for the care, management, maintenance, sanitation, government, operation and protection of the Panama Canal and Canal Zone. The Governor, the

Auditor, and the Paymaster of The Panama Canal, who are the appellees in this action, were appointed by the President and by his authority, and were acting under the Executive Order of the President of December 3, 1921, requiring the payment by employees of the Canal and Canal Zone of rent, fuel, electric current and water supplied to them by the Government; and this action is brought for the purpose of restraining them from carrying out the order of the President of the United States in these respects.

It therefore clearly appears in this case that the suit is brought to enjoin, in effect, the President of the United States, through his appointees, from carrying out a procedure adopted for the operation of the Panama Canal and promulgated by Executive Order, and that this action, if it may be maintained, will subject the executive department of the United States to interference by the judicial department in a matter where the executive department has the right to exercise judgment and discretion. We submit, therefore, that the District Court was without jurisdiction to entertain this action, and that this court is without jurisdiction so to do.

IV.

ANSWER TO APPELLANTS' BRIEF.

It is contended by the appellants in their brief:

(1) That the Panama Canal Act validated all previous laws, rules, regulations and ordinances of the Canal Zone, including the regulation for free quarters;

(2) That under the terms of the Panama Canal Act the President had no power to promulgate the Executive Order of December 3, 1921; and

(3) That the President, and those acting under his authority, have no power under the Panama Canal Act to lease the quarters on the Canal Zone to employees.

Without prejudice to the question of jurisdiction presented in this brief, the appellees answer the brief of the appellants, as follows:

Appellants quote in their brief (p. 5) Section 53 of Act No. 8 of the Laws of the Canal Zone, providing that employees whose salaries are $1,000 or more per year shall be entitled to quarters, or in lieu thereof commutation at 8 per centum of the annual salary. This act provides for the organization of the executive branch of the Government of the Canal Zone, and the section in question is to be found in that part of the act dealing with education. (Laws C. Z., 61 and 78). It was adopted September 2, 1904. On the same page of appellants' brief the Isthmian Canal Commission declares that this is a tentative regulation under date of December 3, 1904. (Appellants' brief, p. 5.) Frequent changes were made in these regulations by the Isthmian Canal Commission after 1904, and up to and including December 7, 1907, the same being treated at all times as regulations imposing conditions of employment. At its 100th meeting, October 30, 1905, the Commission provided as follows:

> "Where practicable and in the best interests of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time, and if quarters are not available he will be granted in lieu thereof a sum payable monthly equal to 15 per centum of his monthly compensation."

At its meeting on February 13, 1907, it adopted the following regulation:

> "Whenever practicable and in the best interests of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time."

At its 129th meeting, June 11, 1907, in prescribing general conditions of employment, the Commission provided:

> "Where practicable and in the best interests of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time. Family quarters will be assigned when available, assignments to be made in accordance with the date of application."

At its 137th meeting, December 7, 1907, the Commission amended the regulations adopted on June 11, 1907, as follows:

> "Where practicable and in the best interests of the service, an employee will be provided with such bachelor quarters on the Isthmus as may be available from time to time. No agent of the Isthmian Canal Commission is authorized or empowered to promise family quarters to employees, and notice is particularly called to the fact that the supplying of family quarters is not a condition of employment." (See Minutes of Meetings of the Isthmian Canal Commission, above referred to.)

On September 4, 1907, the Isthmian Canal Commission began the publication of an official paper known as *The Canal Record*. As stated thereon the paper was "issued free to all employees of the Commission whose names were on the gold roll." Under date of January 22, 1908, the regulation adopted December 7, 1907, was published with the following explanation:

> "Owing to the large number of applications for family quarters on file and the great expense involved in the construction of such quarters, as well as the insufficiency of available funds, it was determined at the 137th Meeting of the Isthmian Canal Commission, held December 7, 1907, that the general conditions of employment should be

> changed with the view of relieving the Commission of the obligation to furnish family quarters to employees engaged for service after January 1, 1908. The new conditions became effective January 1, 1908, and will apply to all employees appointed on and after that date." (*The Canal Record*, Vol. I, p. 162.)

As a matter of fact, the Isthmian Canal Commisson ceased to pay commutation of quarters after January 1, 1907, and in order that there be no mistake about the matter, at the meeting of June 11, 1907, the Commission adopted this further provision:

> "All appointments made prior to this Resolution are hereby terminated, to take effect at the end of the next leave period accruing under such appointment. Conditions of service thereafter will be in accordance with the rules and regulations of the Commission."

The appellants, after quoting Section 53 of Act No. 8, on p. 5 of their brief, say on p. 6 that—

> "The said Commission, on February 13, 1907, adopted regulations governing employment setting forth the same privileges."

And on p. 13 appellants say—

> "and no change up to the time of the passage of the Panama Canal Act was made, either by Congress or the Commission."

But the court will observe from the quotations made above that the original regulations were entirely abandoned, and that at the time the Panama Canal Act was passed, August 24, 1912, the regulations were based upon the enactment of the Commission of June 11, 1907 and December 7, 1907.

No extended argument is necessary upon these matters. It is quite clear that the Commission changed these regulations from time to time to meet the circumstances as they arose, and that the last authorita-

tive regulation was adopted June 11, 1907, as amended at the Meeting of December 7, 1907; and all those regulations amount to is the provision that when practicable and in the best interests of the service, quarters will be furnished, but that no agent of the Isthmian Canal Commission had authority to promise quarters as a condition of employment. As is said by the Circuit Court of Appeals in this case (279 Fed., 617, at 620), after quoting the regulation of February 13, 1907:

> "We understand that the just-quoted regulation is the one on the subject which was in force at the date of the enactment of the Panama Canal Act on August 24, 1912. In behalf of the plaintiff it is contended that the above-quoted provision of section 2 of that act had the effect of keeping the just-quoted regulation in force 'until Congress shall otherwise provide.' If that position is a tenable one, it does not follow that the plaintiff has an enforceable right to continue to occupy, free of rent, the government property which was assigned for his use. The language of that regulation negatives the conclusion that thereby the employer relinquished or abridged its right to determine, in the case of any employee, whether it is or is not practicable and in the best interests of the service to provide such employee with quarters on the Isthmus.
>
> "The matter remained one as to which the employer had and retained a right to exercise its unregulated and unqualified judgment or discretion. The terms of the regulation make the continuance of the privilege or benefit in question dependent upon the authorized representative or representatives of the employer continuing to be of opinion that it is in the best interests of the service not to change the policy or practice. An employee has no legally enforceable right to what the employer has the option to grant or withhold as the latter's judgment or discretion may dic-

tate. The continuance of the arrangement practically was no more assured than it would have been if a tenancy at the will of the employer had been created. The existence of the regulation and what was done under it brought about a situation like that resulting from a contract which is so uncertain and contingent in its terms as to be legally unenforceable. Brown *v.* Camp C. C. A.) 275 Fed., 612; Wald's Pollock on Contracts (3d Ed.) 48, 49."

The Panama Canal Act, Sec. 2, provides:

> "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

It is this provision which the appellants contend ratifies the regulations of the Isthmian Canal Commission relating to quarters and which gives to the employees, as contended, the right to the use of quarters free. The purpose of adopting this section is stated in the report of the Committee accompanying the introduction of the bill in the House of Representatives, as follows:

> "This section is intended to ratify and confirm existing laws and organizations under which the Canal Zone is governed and the Canal is being constructed. The existing judicial system is likewise recognized and confirmed. While not regarded as absolutely essential, all this is deemed appropriate for the reason that at the end of the 58th Congress, in default of renewed legislation, the law for the temporary government lapsed, and the President not only preserved the status established under the temporary provision, but also extended and continued the exercise of all necessary authority and functions of government

> de facto in so far and whenever necessary authority was found not to have been conferred by the Canal Act and various subsequent acts of Congress. The Committee approves of the course pursued by the Executive and recommends legislative approval thereof as appropriate." (*Cong. Record*, 62d Cong., 2d Sess., vol. 48, p. 3493.)

Section 2 of the Panama Canal Act was therefore merely a validating statute ratifying and confirming such things as had been done by the President or by his authority in the conduct of the Panama Canal project and the government of the Canal Zone after the end of the 58th Congress. And Congress had no intention, in our judgment, by ratifying or confirming these regulations of the Commission, of prescribing permanent rules and regulations respecting conditions of employment on the Canal Zone, nor did it intend to limit the right of the President, and those authorized by him, to prescribe the conditions of employment, by contract or otherwise, of those employed after the passage of the act or those who might continue in employment after the passage of the act in completing and operating the Panama Canal and governing the Canal Zone. (McConaughey *v.* Morrow, 279 Fed., 617, at 621.)

This brings us to the consideration of the second contention of the appellants, that the President had no power under the Panama Canal Act to promulgate the Executive Order of December 3, 1921, providing that thereafter employees should pay rent for quarters and for fuel, light, and water furnished. Section 4 of the Panama Canal Act, in so far as it is relevant to this question, reads as follows:

> "That when in the judgment of the President, the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is author-

ized by Executive Order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist, and the President is authorized thereafter to complete, *govern*, and *operate* the *Panama Canal*, and *govern the Canal Zone*, or cause them to be completed, *governed*, and *operated*, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, *operation*, *government*, and protection of the *canal* and *Canal Zone*.

* * * The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified.

* * * All other persons necessary for the completion, *care*, *management*, maintenance, sanitation, *government*, *operation*, and protection of the Panama Canal and Canal Zone *shall be appointed by the President, or by his authority, removable at his pleasure*, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than 25 per centum the salary or compensation paid for the same or similar service to persons employed by the Government in continental United States."

It will be noted from this section that the grant of powers to the President is broad. He is authorized to complete the Canal and to govern and operate the Panama Canal and govern the Canal Zone, or cause the same to be done through a governor of the Panama Canal, and such other persons as he may deem competent to discharge the various duties in connection therewith. After providing that the President shall appoint the Governor, it provides that the President shall appoint

"all other persons necessary for the completion, *care, management*, maintenance, sanitation, *government, operation*, and protection of the *Panama Canal* and *Canal Zone*," and that all such persons shall be appointed by his authority and be "*removable at his pleasure.*" And the section further gives the President the power to fix the compensation of such persons. The terms "govern," "government," "operation," "management," as used in this section, have their ordinary meaning. The Standard Dictionary defines the term "govern" to mean, "to rule over according to the forms or usages of law; to control by authority." Webster's definition is the same. Synonyms are "control, direct, manage, rule." The word "govern" implies power to ordain and establish suitable police regulations. (Richmond, P. & F. R. R. Co. *v.* Richmond, 96 U. S. 521, at 528.)

"Government" is the exercise of authority in the administration of the affairs of a state, community, or society.

> People *v.* Powers, 41 N. Y., Supp. 858.
> Platt *v.* San Francisco, 110 Pac., 304, at 309.

In the latter case the Supreme Court of California says that—

> "Government is defined as being the exercise of authority in the administration of the affairs of a state, community, or society; the act of governing or state of being governed, especially authoritative administration of the affairs of a state or community. These definitions include every function which may lawfully be allotted to a municipality to perform. No other meaning can reasonably be attributed to the word 'government' as used in the section under consideration." (The section under consideration was section 8 of Article 11 of the Constitution of California, providing for a form of city government.)

The term "operate" is defined by the Standard Dictionary, as follows: "To conduct or manage the affairs of."

The word "manage" means to direct, control, govern, administer or oversee.

Comm. *v.* Johnson, 144 Pa. St., 377, 22 Atl., 703.
Youngworth *v.* Jewell, 15 Nev., 45, at 48.
Ure *v.* Ure, 185 Ill., 216, 56 N. E., 1087.

As used in the laws of Connecticut, which provide that conservators shall manage the estates of their wards, the word "manage" includes the leasing of the estates. (Palmer *v.* Cheseboro, 55 Conn., 114, 10 Atl., 508.)

The phrase "managed or cared for by them" in a will implies that the executors had the right to lease the property of the estate and receive the rents and profits. (Higgins *v.* Downs, 91 N. Y. Supp. 937).

The words "control and management" used in a will devising property to testator's son and declaring that he shall have the control and management of the same during life, mean that the son should have the use, possession, superintendence and protection of the property and the power of exercising a general restraint over the same until the happening of the event that will determine the taker of the fee, but it does not include the power of sale. (Randolph *v.* Josselyn, 59 Vt., 557, 10 Atl., 577.)

Whatever Congress may have intended by Section 2 of the Panama Canal Act ratifying previous laws, regulations, rules and ordinances of the Canal Zone, there can be no doubt as to what it meant in Section 4 of the act, where it constituted the President, acting either by himself or through others appointed by him, the employer of all persons other than the Governor for the completion, care, management, government and operation of the Panama Canal and the Canal Zone. Under that grant of authority the President is placed in abso-

lute control of the physical property of the United States in the Canal Zone, except that he has no power to sell the same. He may use any part or all of it to effectuate the purposes specified in Section 4. He may deny to any and every employee the right to use quarters on the Canal Zone. There is nothing in the law which requires any employee, other than the Governor, District Judge, United States Attorney, and United States Marshal, to reside in the Canal Zone. He may insist as a condition of employment that each employee shall sign a contract to pay for the use of his quarters furnished by the United States. To hold otherwise under the powers granted in Section 4 of the Panama Canal Act would be to abridge the freedom of contract guaranteed by the Constitution of the United States. Under the provision contained in Section 4 that employees are "removable at his pleasure," no employee has had, or could have, since August 24, 1912, a valid contract of employment upon any other terms. The President may therefore terminate the employment of any employee at any time and provide that if he desires to be reemployed it must be upon such reasonable terms and conditions as the President may fix. By the Executive Order of December 3, 1921, set forth at length in the appellants' complaint in this action, the President has fixed the terms of employment of all employees on the Canal Zone with respect to quarters, light, fuel, water, and sanitary charges.

The relation between the President and the employees of the Canal Zone is purely that of master and servant. Appellants concede this to be true in their brief at p. 26, where they say—

> "We believe, however, from the majority of the cases, that the relationship between appellants and the United States is simply that of master and servant, and the use of his quarters is an incident to his employment."

And they cite, among other cases, Bowman *v.* Bradley, 151 Pa. St., 351, 17 L. R. A., 213; Davis *v.* Williams, 130 Ala., 530, 30 So., 488, 54 L. R. A., 749; School Dist. *v.* Batsche, 106 Mich., 330, 29 L. R. A., 576, and other cases.

To which the appellees add the following citations:

24 Cyc., 880;

Snedeker *v.* Powell, 32 Kans., 396, 4 Pac., 869.

Kerrins *v.* People, 60 N. Y., 221, 19 Am. Rpts., 158.

Presbey *v.* Benjamin, 169 N. Y., 377, 57 L. R. A., 317.

Church *v.* Froislie, 37 Minn., 447, 35 N. W., 260.

Bowman *v.* Bradley (supra) seems to be the leading case upon this question, and in that case the Supreme Court of Pennsylvania uses the following language:

> "Was that right (the right to use a house upon the premises Bowman was employed to care for) an incident of the hiring, and dependent on the continuance of the relation of employer and employee, or had it an independent separate existence, so that he was to be treated as a tenant for years, with a right to remain in possession for one whole year, whether he remained in the employment of the owner or not? * * * This should be determined upon a consideration of the nature and purpose of the contract, and the character of the business to which it relates. * * * If the possession of the house be regarded as an incident of the hiring, the incident must fall with the principal. * * * It is not necessary that occupation of a house or apartments should be a necessary incident to the service to be performed in order that the right to continue in possession should end with the service. It is enough if such occupation is convenient for the purposes of the service, and was obtained by reason of the contract of hiring."

It is a matter of common knowledge that the Isthmian Canal Commission, up to the time it went out of existence, and the President and those under his authority since repaired a great many of the old French houses which the Government had acquired when it acquired the Canal Zone and built a very large number of other houses and buildings which have been used by the employees in the Canal Zone for quarters. These structures are in a number of different communities along the course of the Panama Canal and are situated at convenient places adjacent to the places where the employees perform their work. It is not necessary that the employees should live in these quarters, but it is convenient for them and for the Canal authorities that they should do so. When any particular person is employed in the Canal Zone and is assigned to duty he is also assigned quarters, where practicable, if the quarters are available, and when he ceases to be an employee his right to the use of the quarters assigned to him ceases. The use of these quarters is a mere incident to the contract of hiring, and under the Panama Canal Act as each employee is removable at the pleasure of the President or those acting under his authority, it follows as a natural consequence that when his employment ceases his right to the incidental use of quarters at once terminates.

Instead of adopting the Executive Order of December 3, 1921, it would have been just as effective for the President, directly or through the Governor of the Panama Canal, to say to each employee, "Your employment is terminated as of this date, together with all terms and conditions thereof. Hereafter if you desire to continue in the employment of the President in the Canal Zone you will be required to pay rental for your quarters and to pay for fuel, lights, water and sanitary service." In fact, this is precisely what was done in 1914, when the

President, by Executive Order of January 27, 1914, terminated the organization of the Isthmian Canal Commission and created a new organization, which is still functioning. Colonel Goethals, Chairman of the Isthmian Canal Commission, under date of March 30, 1914, as the last act of his work as Chairman of the Commission, issued a circular, which was published in *The Canal Record*, April 1, 1914, vol. 7, p. 297, containing these provisions:

> "1. The entire personnel of the organizations of the Isthmian Canal Commission and the Panama Railroad Company on the Isthmus is hereby notified that at the close of business on March 31, 1914, all contracts of employment will terminate, with the exception of those of employees on sick or injury leave, in which cases, the contracts will be annulled at the termination of the period of disability.
>
> "2. This action is necessitated by the discontinuance by law of the present organization on that date, the inauguration, on April 1, 1914, of the permanent organization for The Panama Canal, as provided in the Executive Order of January 27, 1914, and the adoption for all the present force, including the Panama Railroad Company's employees on the Isthmus, of new conditions of employment, as provided in the Executive Order of February 2, 1914.
>
> "3. All employees, except those noted in paragraph 1, who are on the rolls as of March 31, 1914, and who have not resigned or been notified that their services are no longer required, will be considered transferred to the new organization on April 1, 1914, and will from the date upon which service and compensation begin in the new organization be subject to the conditions of employment contained in the Executive Order of February 2, 1914, and to the further rules and regulations of the Governor, except that teachers will not be granted cumulative or travel leave."

The Executive Order of January 27, 1914, terminated the old organization under the Isthmian Canal Commission, and transferred it to a new organization. The memorandum accompanying that Order under date of February 2, 1914, contains the following provision with respect to quarters:

> "Where practicable, such bachelor quarters on the Isthmus as may be available from time to time will be assigned all employees desiring them. Family quarters, when available, will be assigned under such rules as may be prescribed by the Governor. A charge will be made for rent, fuel, and electric current at such time and in accordance with such regulations as the President may hereafter establish."

It thus appears that the Plaintiff and all others whom he represents, after the passage of the Panama Canal Act and after the creation of the new organization accepted and continued their employment under the new organization and under the rules and regulations thereafter to be adopted with respect to the use of quarters; and they knew, because they are bound to know the provisions of the Panama Canal Act, that they were removable at the pleasure of the President or those acting by his authority, and that upon removal from their employment their right to quarters terminated.

It is further contended by the appellants that while admitting that they are not lessees and that the relation of master and servant exists between them and the President, nevertheless that they have some sort of an interest in the quarters occupied by them which is susceptible of enforcement, and that the President has no power to lease the quarters on the Canal Zone. Under the authorities hereinbefore cited the President has the authority to lease these quarters and to exact rent therefor under the general authority of the Panama Canal

Act to govern, manage and operate the Panama Canal and the Canal Zone; but from the authorities above cited the use of the quarters is a mere incident to the employment, and when the employment ceases the employee has no further interest therein. The Executive Order of December 3, 1921, terminated in effect the employment of every employee in the Canal Zone, unless the employee was willing to consent to and abide by the terms and provisions of that order. . .

Appellants' brief calls attention to the final section of the Panama Canal Act where the "right to alter, amend, or repeal any or all of its provisions or to extend, modify, or annul any rule or regulation made under its authority, is expressly reserved." With respect to the first clause, Congress simply reserved the right to alter, amend, or repeal any of the provisions of the Panama Canal Act, and in the second clause it reserved the right to extend, modify, or annul any rules or regulations made under the authority of the Panama Canal Act. This does not relate in any manner to any prior laws, rules or regulations. As one instance, the Panama Canal Act gave the President the right, among other things, to fix the rate of tolls within certain limits, and by this reservation of power Congress has the power to change the rate of tolls at any time, notwithstanding what the President may have done with respect thereto.

It is also contended in the 4th Assignment of Error (Brief, p. 16) that by the Constitution, Congress has the power to dispose of and to make all needful rules and regulations respecting the territory or other property of the United States, and it is argued that Congress has not made any provision for the disposition of the property in the Canal Zone belonging to the United States. The ready answer is that Congress in the Panama Canal Act did make such provision. So far as the property of

the United States in the Canal Zone is concerned the President has the power to care for, manage and control the same, which gives to the President practically every power which he could exercise other than the power of sale. Can it be said with reason that the President has no power to regulate the use of the tugboats and barges and docks and the locks and the other property of like kind in the Canal Zone necessary to be used in the operation of the Canal? Can it justly be said that he has no power to build additional houses for quarters upon land of the United States in the Canal Zone? Are not the houses and the water plant and the electric-light plant just as much necessary equipment for the care and operation of the Canal as the tugs and barges and steam shovels and locks of the Canal Zone? Indisputably it seems to the appellants the President has full power and control over all these matters, including the terms and conditions for the use of quarters, the electric current and the water used by the employees in the Canal Zone.

Appellants have cited and rely upon Smith *v.* Jackson (241 Fed., 747), affirmed in 246 U. S., 388, as authority for the proposition that the injunction should be granted in this case. That case and the present case are not parallel. In the Smith-Jackson case the question involved was the salary of a District Judge appointed by the President for a definite term of 4 years at a definite salary fixed by Congressional enactment at $6,000 per year; and this was a part of the statutory organization for handling the judicial affairs of the Canal Zone. This statute (the Panama Canal Act) further provided that the District Judge should reside in the Canal Zone, and no provision was made by Congress either for or against his use of quarters. It appears that one of the laws of the Canal Zone validated by the Panama Canal

Act was a provision that the Judge should have quarters free or commutation of quarters to the amount of eight (8) per centum of the annual salary. And it appears that Congress had made a specific appropriation to pay the salary of Judge Jackson.

The plaintiffs in this action are administrative employees outside of the statutory organization. Their salaries are not fixed by statute. There is no specific appropriation to pay any particular salary or the total salary of employees. There is no requirement that they shall reside in the Canal Zone, and there is no specific requirement that they shall be furnished with quarters free. The employees of The Panama Canal are a part of the civil administration organization; their tenure of office is at the pleasure of the President; their compensation is to be fixed and agreed upon. In some instances it is based upon hourly service, in some on a daily, and in others on a monthly basis. The rates of pay have in the past and will be in the future changed from time to time. No employee knows until the end of the month how much he will receive, because it is not known until that time how much time he has devoted to the service of his employer. His compensation, therefore, is not a fixed sum, either by statute or regulation; and in no instance is there a specific appropriation for the payment thereof, but a general appropriation covering not only compensation to employees but many other items of expense in connection with the maintenance and operation of the Panama Canal and the government of the Canal Zone. There is no parallel or analogy between the Smith-Jackson case and this case, and the latter case is not an authority in this case.

We have noted and answered several matters contained in appellants' brief, and what we have said, as it appears to us, is all that need be said in answer thereto.

Other matters contained in the brief are fully answered by what has heretofore been said. It is therefore respectfully submitted:

(1) That this case should be dismissed upon jurisdictional grounds;

(2) If not so dismissed, that it should be affirmed upon the ground that the appellants are not entitled to any relief.

Respectfully submitted,

G. H. MARTIN,
District Attorney, and
Attorney for Appellees.

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McCONAUGHEY, FOR HIMSELF AND OTHERS, EMPLOYEES OF THE PANAMA CANAL AND OF THE PANAMA RAILROAD COMPANY, *v.* MORROW, GOVERNOR OF THE PANAMA CANAL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 48. Submitted October 4, 1923.—Decided November 12, 1923.

1. In a suit in the United States District Court for the Canal Zone to restrain the Governor and other officials of the Panama Canal from carrying out an order of the President, upon the ground that plaintiffs will thereby be deprived of personal or property rights contrary to the federal laws and Constitution, an objection that the suit is in effect against the United States does not raise a question of the jurisdiction of the trial court as a federal court reviewable directly by this Court under Jud. Code, § 238, as amended January 28, 1915. P. 41.
2. The Act of September 21, 1922, providing that review by the Circuit Court of Appeals, Fifth Circuit, of judgments of the District Court for the Canal Zone shall include all questions of jurisdiction, was expressly inapplicable to cases then pending in the former court, and, by implication, does not affect a case which had passed through that court and was pending here on appeal from its judgment at the date of the act. P. 42.
3. The Panama Canal Act of August 24, 1912, in declaring "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide," refers to regulations, etc., rising to the dignity of laws, for the purposes named, and did not divest the President of power to revoke previous ad-

ministrative orders and regulations, such as those allowing free quarters, fuel, electric current, water, etc., to government employees. P. 43.

4. Under the Act of March 4, 1907, debts owing the Government of Panama by government employees were deductible from their pay. P. 49.

279 Fed. 617, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the United States District Court for the Canal Zone, which dismissed the bill in a suit of a government employee in the Zone to restrain the Governor and other officials of the Canal from effectuating an order of the President making them chargeable with rent, fuel, etc.

Mr. Harry A. Hegarty and *Mr. John N. Breen* for appellant.

Mr. G. H. Martin for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a complaint filed in the United States District Court for the Canal Zone by Harvey McConaughey in behalf of himself and of all other Government employees occupying Government quarters in the Zone, against the Governor, Auditor and Paymaster of the Panama Canal, charging that the defendants were about to make a charge against complainants for rent, fuel, electric current, water and services in connection with their quarters on and after January 1, 1922, and in case of non-payment to deduct the same from their lawful pay or to oust them from their quarters, all in pursuance of and compliance with an order of the President of December 3, 1921, issued without legal authority and invalid because in conflict with the Constitution and laws of the United States.

The defendants made a motion to quash the order to show cause which had been issued against them and to dismiss the bill, because the case was one in effect against the United States, and because it sought to control the executive discretion vested by law and the Constitution in the President and his subordinates. The court sustained the motion, finding that the order of December 3, 1921, was within the legal authority of the President and under that order the defendants had the discretion to adopt the regulations, enforcement of which it was sought in the bill to enjoin.

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit under § 9 of the Act of Congress of August 24, 1912, c. 390, 37 Stat. 560, 566. A motion to dismiss the appeal was made in the Circuit Court of Appeals, on the ground that it was based solely on a question of jurisdiction and therefore should have come directly to this Court on a certificate of jurisdiction under § 238 of the Judicial Code, as amended January 28, 1915, c. 22, 38 Stat. 804. The Circuit Court of Appeals held that the case did not present a question of jurisdiction of the District Court within § 238, that that section applied only to a question of the court's jurisdiction of the parties or subject matter as a federal court, and that no such issue had been raised here.

We agree with the Circuit Court of Appeals in this view. There is no doubt of the general jurisdiction of the District Court of the Canal Zone as a court of general jurisdiction to hear a suit brought by one resident of the Zone against another upon whom personal service can be had, in respect of any property or personal right of the plaintiff. The question here was whether the court could grant an equitable remedy against an officer of the Canal when, as asserted, it would in effect be an injunction against the United States. This was not a question of jurisdiction appealable direct to this Court. As was said

in *Fore River Shipbuilding Company* v. *Hagg*, 219 U. S. 175, 178:

"This court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but of the jurisdiction of the court as a Federal court." See also *Louisville Trust Company* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523.

By the Act of September 21, 1922, c. 370, § 3, 42 Stat. 1004, 1006, amending § 9, it is provided that review by the Circuit Court of Appeals of the judgments and decrees of the District Court of the Canal Zone shall include all questions of jurisdiction, thus making § 238 of the Judicial Code thereafter inapplicable to cases coming up from that court. The amendment, however, by its terms did not affect cases then pending in the Court of Appeals and provided that they were to be disposed of as if it had not been enacted. The present case was pending in this Court at the time, and we can not suppose, in view of the saving clause as to cases which had reached the Circuit Court of Appeals, that the act was intended to have any effect upon cases which had passed through the Circuit Court of Appeals and had been lodged here. We must deal with this case, therefore, as if the amendment of September 21, 1922, had not been passed. Under either statute, however, the whole case is before us on the sufficiency of the complaint presented below by the motion of the defendants to dismiss it.

The claim of the appellant is that he and those for whom he sues were employees of the Government engaged in and about its work in respect to the construction and operation of the Canal, that while the Isthmian Canal Commission was carrying on this task under the President, it had been its policy to furnish Government employees

quarters free of rent, that this policy was finally embodied in a regulation of the Commission effective April 1, 1907, as follows:

"Whenever practicable and in the best interest of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time", and that thereafter, by proper orders, free fuel, electric current and other service were allowed to employees in Government quarters.

These orders and regulations were in force when the Panama Canal Act was passed August 24, 1912, c. 390, 37 Stat. 560, containing as its second section the following:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

Appellant contends that as all the regulations of the Commission were authorized by the President and unless revoked were to be taken as confirmed by him, they were by the § 2 just quoted made into an act of Congress and thereafter could not be revoked or amended save by another act of Congress otherwise providing. Hence, it is claimed that the Commission's regulation of April 1, 1907, with its succeeding orders on the same subject, has all the force of an act of Congress not to be amended by the President, and that by its terms all employees are entitled to free quarters and to the other privileges.

The force to be given to this claim depends primarily on the proper construction of § 2 of the Panama Canal Act of 1912, and that needs for its reasonable interpretation a short consideration of its legislative history.

On June 28, 1902, c. 1302, 32 Stat. 481, Congress passed a law entitled "An Act To provide for the construction of a canal connecting the waters of the Atlantic

and Pacific oceans", and known as the Spooner Act. It authorized the purchase of the rights of the New Panama Canal Company of France in the uncompleted canal and its holdings of the stock of the Panama Railroad Company and of the right of way from the government of Colombia, and enabled and directed the President to build and complete the canal, and for this purpose gave him authority to employ such persons as he might deem necessary and to fix their compensation. · The act created a Commission through whom the President was to do the work, and provided for the issue of bonds to pay for the purchase and construction provided in the act. Thereafter Panama revolted from Colombia and was recognized by the United States, and on November 18, 1903, made a treaty with the United States (33 Stat. 2234) granting a right of way and transferring perpetual control of the Canal Zone to the United States for the construction of the Canal, which the United States undertook to build and operate. By Act of April 28, 1904, c. 1758, 33 Stat. 429, Congress provided for the payments to be made under the Treaty and the contract with the French Panama Canal Co., authorized the President, after such payments, to take possession of the territory conveyed by the treaty for canal purposes, and established the Zone conveyed as "The Canal Zone." Section 2 provided as follows:

"That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion."

Under this act, the President took possession of the Zone and directed that the Canal should be constructed and the Zone governed by him through the Panama Canal Commission under the supervision of the Secretary of War. Letter of President to Secretary of War, May 9, 1904. Executive Orders relating to Panama Canal, page 20. Executive Order dated November 17, 1906. *Idem*, page 55. A government was organized, a *modus vivendi* was agreed to with the government of Panama, and the construction of the Canal was carried on. A Governor of the Canal was appointed, courts were established and complete rules and regulations having the force of law were duly adopted and enforced. Law and order were thus maintained, persons violating these regulations were prosecuted and convicted, and the construction of the Canal was much aided by the governmental control exercised by the same body that carried on the great work. A volume of Canal laws thus enacted and a volume of Executive Orders relating to the Canal were published by the Canal authorities.

It will be noted that the second section of the Act of April 28, 1904, by which the President was authorized to establish a government in the Canal Zone and was given legislative power therein, was expressly limited in its duration to the expiration of the Fifty-eighth Congress, which occurred on the 4th of March, 1905. On March 6, 1905, the Secretary of War telegraphed the Governor of the Canal Zone, "Government of the Canal Zone will be continued to be administered in obedience to the laws of the United States in force in that territory, the Executive Orders heretofore issued, and the laws of the Canal Zone enacted by the Isthmian Canal Commission during the period the Commission was authorized under Act of Congress approved April 28, 1904, to exercise the power of legislation." (Treaties and Acts of Congress Relating to Panama Canal, Annotated, page 35, note). Between

1905 and 1912, when the Canal Act already cited was passed, there was no express legislation looking to the continuance of the powers of the President under the Act of April 28, 1904. The existence of the Government of the Canal Zone after March 4, 1905, was, however, recognized in appropriations for the payment of its employees and other of its expenses for 1906 (34 St. 762), for 1907 (34 St. 1370), for 1908 (35 St. 386), for 1909 (35 St. 1026), for 1910 (36 St. 772) and for 1911 (36 St. 1450). On January 21, 1907, the Secretary of War asked the Attorney General whether the power of the President to make laws in the Zone, conferred in the Act of April 28, 1904, had ceased at the close of the Fifty-eighth Congress, so that no further legislation could be adopted or existing legislation modified. The answer was that the provision in the law of 1904 was merely declaratory of what would have been the authority and duty of the President growing out of the Treaty and the Spooner Act, even if the Act of 1904 had not been enacted, that new legislation might be adopted by the President, and that Congress' acquiescence in, and approval of, the Government as carried on could be inferred from its appropriations to pay the Canal Government's expenses. Opinions of Attorneys General, vol. 26, p. 113. So the government of the Zone went on. Nevertheless, its legality was from time to time questioned, and on March 19, 1908, the House of Representatives passed a resolution asking the President that it be informed by what authority of law he exercised the functions of government in the Panama Canal Zone since the expiration of the Fifty-eighth Congress. 42 Congressional Record 3592. This was answered by the President in a message of April 4, 1908 (42 Congressional Record 4387), by stating the same grounds as those contained in the opinion of the Attorney General, already referred to. In his annual message of December 21, 1911 (Messages and Papers of the Presidents, Vol. XVII, pp. 7681, 7687),

the President, in announcing the probable completion of the Canal in 1913, said:

"The fact is that today there is no statutory law by authority of which the President is maintaining the government of the Zone. Such authority was given in an amendment to the Spooner Act, which expired by the terms of its own limitation some years ago. Since that time the government has continued, under the advice of the Attorney General that, in the absence of action by Congress, there is necessarily an implied authority on the part of the Executive to maintain a government in a territory in which he has to see that the laws are executed. The fact that we have been able thus to get along during the important days of construction without legislation expressly formulating the government of the Zone, or delegating the creation of it to the President, is not a reason for supposing that we may continue the same kind of government after the construction is finished. The implied authority of the President to maintain a civil government in the Zone may be derived from the mandatory direction given him in the original Spooner Act, by which he was commanded to build the Canal; but certainly, now that the Canal is about to be completed and to be put under a permanent management, there ought to be specific statutory authority for its regulation and control and for the government of the Zone, which we hold for the chief and main purpose of operating the Canal."

From this review of the history of the Canal Zone government, the purpose of Congress in enacting the second section of the Canal Act of 1912 must be apparent. There had been no lack of authority in the President after the Spooner Act to build the Canal and employ those who were to do the work. The defect was in the lack of definite authority to create a government, make laws and enforce them, and this had to be spelled out. Congress

deemed it wise, therefore, as it certainly was, to ratify and confirm everything two Presidents had done in carrying on government and making and enforcing law in the Zone. It is in the light of this that the second section must be interpreted. The section confirms "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone and the construction of the Panama Canal." This means laws needed and enacted to constitute the government, promote sanitation and generally aid the construction of the Canal. It was intended to ratify that as to the validity of which doubt had been expressed. It was only those regulations which rose to the dignity of laws which required ratification. To give the construction to § 2 contended for by appellant would lead to a most absurd result in view of its closing words which ratified and confirmed such laws, rules, regulations and ordinances "*as valid and binding until Congress shall otherwise provide.*" This would be to put innumerable administrative orders and rules adopted in the work, which were necessarily subject to change from time to time as conditions changed and the work progressed, into a strait-jacket, entirely inconsistent with the broad authority of the President granted in the Spooner Act and renewed in § 4 of the same Canal Act of 1912, as follows:

"That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and oper-

ated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone."

In 1914 the President discontinued the Commission, and appointed a Governor. On January 15, 1915, he issued an executive order announcing that the policy of furnishing quarters, fuel and electric current free to all employees was revocable, conferred no vested right upon employees and its future revocation would not be made the basis for increasing compensation. Ex. Order No. 2118—Executive Orders Relating to Panama Canal, Annotated, page 207. Certainly, after this, the appellant can not claim that he and those on whose behalf he sues were misled into accepting employment on the faith of the maintenance of these privileges. Six years thereafter the President made the order here complained of, directing that the charges imposed therein upon employees should be deducted from their pay. The right to deduct from their pay debts owing to the Government by Panama employees was expressly conferred by the eighth section of the Act of March 4, 1907, c. 2918, 34 Stat. 1371. The President's order was therefore valid in all respects.

The Circuit Court of Appeals held that the so-called regulation of 1907 in its form and language was only a declaration of revocable policy and on its face was not a rule capable of being stiffened into binding legislation under § 2 of the Canal Act. We have, however, preferred to put our conclusion on the broader ground that the subject matter of the regulation was not covered by the section.

The motion to dismiss was properly granted by the District Court and its decree was properly affirmed by the Circuit Court of Appeals.

Affirmed.